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# NATIONAL APPEALS DIVISION GUIDE

## SECTION 1 - GENERAL

### I. INTRODUCTION

This guide outlines the policies and procedures of the U. S. Department of Agriculture's (USDA) National Appeals Division (NAD). Actions of NAD are governed by regulations codified at Part 11 of Title 7 of the Code of Federal Regulations (7 CFR). This guide sets forth policy for NAD activities from appealability reviews through hearings and reconsiderations to Equal Access to Justice Act (EAJA) reviews. It outlines policies and procedures for employee conduct, managing the hearing process, preparing determinations, and ensuring the quality and consistency of correspondence and determinations.

NAD adjudicates appeals from adverse program decisions of certain USDA agencies. NAD has no jurisdiction over questions of law or the appropriateness of agency regulations, nor does it adjudicate discrimination complaints or equal employment disputes. In its determinations, NAD decides whether an agency complied with applicable laws and regulations in rendering the adverse decision under appeal. NAD has no enforcement authority; implementation of final determinations is the responsibility of the head of the agency involved. NAD final determinations are reviewable and enforceable in Federal courts.

As a "guide," all of the procedures in this document need not to be carried out to "the letter"; however, adherence to the procedures will ensure that NAD's administrative appeals process is conducted in a proper and legally sufficient manner and that the integrity of the process will be maintained.

### II. DEFINITIONS (7 CFR §11.1)

In its regulations, NAD is referred to as the ***Division***. An ***agency*** refers to one of several program agencies of USDA. A ***participant*** is an individual or entity that participates or seeks to participate in an agency program.

The appeal process usually begins with an ***adverse decision*** issued by an agency entity. An adverse decision also exists when an agency fails to act on a participant's request within specified time frames or within a reasonable time if time frames are not specified. An adverse decision is deemed either appealable or nonappealable by the agency, but the Director or his delegate may review the agency's determination and the appealability decision is final and not appealable. **7 CFR §11.6(a).**

If an adverse decision is made by an employee of a Farm Service Agency (FSA) county or area committee, the appellant must seek an *informal review* by the county or area committee before appealing to NAD. **7 CFR §11.5(a).**

The *agency record* is all the materials maintained by an agency related to the adverse decision at issue. The *hearing record* contains all documents, evidence, and other materials generated in relation to the hearing, including the taped or transcribed *official record* of the hearing. The *case record* contains the agency record, the hearing record, and materials related to subsequent actions, such as review and reconsideration.

A participant may request an appeal of an adverse decision. All requests for appeal must be personally signed by the participant and received within the prescribed time frame. **7 CFR §11.6(b).** When an appeal is accepted by NAD, the participant becomes an *appellant*.

If an appeal determination adjudicates the rights of a *third party*, such third party has the right to participate in the appeal as an appellant. Third parties may include a variety of individuals or entities, such as a tenant in an appeal involving a payment shared with a landlord or a recipient of a portion of a payment shared by multiple parties. Third parties are notified of the appeal and given an opportunity to participate. Third parties who have notice of the appeal are bound by the appeal determination, even if they choose not to participate in the appeal. **7 CFR §11.15(a).**

*Interested parties* are defined as guaranteed lenders and reinsurance companies with an interest in a participant's appeal. An interested party may participate in an appeal, but does not become an appellant. **7 CFR §11.15(b).**

The appellant has the right to a *hearing* in his/her State of residence or at a location convenient to the appellant and NAD; a telephone hearing may be conducted at the request of the appellant. At the hearing, the appellant may present evidence to show why the adverse decision was wrong, and the agency may explain and defend its decision. Instead of a hearing, an appellant may request an appeal determination based on a review of the agency record and any additional submissions by the parties. **7 CFR §11.8(c).**

A *Hearing Officer* is a NAD employee who has been appointed by the Director to hear and decide cases. The Hearing Officer issues an *appeal determination* that rules whether or not the agency's adverse decision was erroneous.

Only the Director may grant *equitable relief*. If the appellant seeks equitable relief, the Hearing Officer should make findings of fact on which the Director may determine whether to grant relief. **7 CFR §11.9(e).**

An appellant or the head of an agency may request, within prescribed time frames, that the Director review the appeal determination. Requests for Director review must be personally signed and explain why the requesting party believes the appeal determination is wrong. The Director issues a ***Director review determination*** based on whether the appeal determination is supported by substantial evidence.

An appellant or the agency may request, within prescribed time frames, that the Director reconsider the Director review determination. Such ***reconsideration*** is available only where the requesting party presents a detailed statement of a material error of fact made in the Director determination or a detailed explanation of how the determination is contrary to statute or regulation, which would justify reversal or modification of the determination. **7 CFR §11.11.**

### **III. EMPLOYEE CONDUCT AND RESPONSIBILITIES**

NAD employees are representatives of USDA. NAD is responsible for providing fair, impartial, and independent evidentiary hearings and reviews to parties challenging adverse decisions by certain USDA agencies. Hearings and all related activities by NAD employees must be carried out in a manner that fulfills this responsibility.

**A. General.** Actions by employees reflect on NAD and on USDA. It is essential that employees avoid bias or prejudice for or against anyone participating in a NAD proceeding. No party will receive special treatment, positive or negative. This applies before, during, and after a hearing, review, or other activity. Because of differences in perception of verbal statements and actions, care must be taken to avoid comments or actions that may be misconstrued as predispositions for or against any party involved with an appeal.

**B. Civil Rights.** It is the policy of NAD to ensure the civil rights of all employees and participants in NAD proceedings, and to treat everyone fairly and equitably, with dignity and respect. NAD policies and employees should demonstrate a commitment to equal opportunity for all, regardless of race, color, national origin, gender, age, religion, disability, political beliefs, sexual orientation, or marital or family status. Reprisal of any kind against an employee or participant exercising his or her civil rights will not be tolerated. Participants who raise discrimination complaints should be referred to USDA's Office of Civil Rights.

**C. Accommodations for persons with disabilities.** NAD supports the letter and the spirit of the Americans with Disabilities Act. Upon receipt of timely notice of the need for accommodation, NAD will make an effort to provide a reasonable accommodation for participants including appellants, representatives and witnesses. All accommodations include the provision, at NAD expense, of

sign language interpreters for the hearing impaired, large print or Braille versions of correspondence and determinations, and similar services.

Because each case is unique, the needs of the requester will be addressed on a case-by-case basis. The Hearing Officer should work with the regional office to ensure reasonable accommodations are available to all persons with disabilities.

**D. Ex Parte Contacts. (7 CFR §11.7)** Ex parte contacts are oral or written communications about the merits of a case between a NAD employee and any person outside of NAD with an interest in a case (including parties, representatives and agency employees) without an opportunity for the other parties to participate. NAD employees may not have ex parte contact with any party to an appeal unless all parties have been notified of the conversation and given an opportunity to participate (see 7 CFR §11.1). For example, a party may not discuss the facts of the case unless all parties have been afforded the opportunity to participate in the conversation. All written communication between the Hearing Officer and anyone associated with the case shall be provided to all parties. Ex parte communications are prohibited at all times until a final NAD determination has been issued.

At no time between the filing of an appeal and the issuance of a final determination may any employee of NAD communicate regarding the substance or merit of an appeal with any person having an interest in the pending appeal or anyone in an advocacy or investigative capacity.

NAD employees may communicate with one party about procedural matters (scheduling, address verification, inquiries about procedures, etc.) without notice to other parties. Care must be taken to avoid discussing substantive matters during conversations about procedures.

If a Hearing Officer has a question after the conclusion of the hearing concerning any substantive matter, such as how a regulation applies in the case, eligibility requirements, etc., he/she may not engage in an ex parte contact. Instead, the Hearing Officer should request that the parties submit their views in writing, or the hearing may be reconvened to obtain evidence and the positions of the parties.

Information obtained in written submissions must be provided to all parties and included in the case record. (7 CFR §11.7)

If a prohibited ex parte contact occurs, the NAD employee shall put any written communication into the case record and provide it to all parties. If a prohibited oral ex parte communication occurs, a written memorandum describing the substance of the communication shall be provided to all parties and placed in the case record. Other parties must be given an opportunity to respond and such responses shall also be placed in the case record.

If a prohibited ex parte communication occurs, the Hearing Officer or the Director may, to the extent consistent with the interest of justice and the policy of the underlying program, require the party to show cause why the appeal should not be dismissed, denied, or disregarded.

**E. Conflict of Interest and Bias.** NAD employees are subject to all requirements regarding conflict of interest or bias imposed on USDA employees by Federal statute (including civil rights laws), particularly 18 U. S. C. 201-209, the Standards of Ethical Conduct for Employees of the Executive Branch (5 CFR §2635), and USDA policies and regulations applicable to employee conduct.

**1. *Conflict of Interest.*** NAD employees should avoid the appearance of conflicts of interest as well as actual conflicts. Conflicts of interest may arise when there is an affiliation with someone having an interest in an appeal; when an employee has a financial interest in the outcome of an appeal; or when the appeal determination may result in a gain or loss to the employee. A conflict of interest can interfere with the ability to make an impartial determination.

Even situations that might not strictly constitute a conflict of interest may be problematic. Participation in certain types of social interactions should be avoided to prevent the appearance of favoritism or bias. While being friendly with parties does not affect the ability to be impartial, socializing with a party or representative may cause concern and diminish other parties' faith in the objectivity of the appeal process. Hearing Officers, for example, must avoid the perception of unequal treatment of parties at the hearing, immediately before and after, even if they have an established relationship with one of the parties. For example, a Hearing Officer should not socialize with one of the parties while a proceeding is pending before him/her, no matter what type of relationship the two may have had in the past.

A Hearing Officer should not attempt to resolve conflict-of-interest issues by his or herself. The Hearing Officer must notify his/her supervisor of any possible conflict of interest or possibility of a perceived conflict of interest. The Hearing Officer must recuse him/herself if an actual conflict of interest exists.

If a conflict of interest is alleged during a proceeding, the Hearing Officer will consult with his/her supervisor, and may recuse him/herself. If the Hearing Officer believes the allegations are without merit, he/she will notify the parties in writing of his/her determination and the reasons for that determination.

**2. *Bias.*** The concept of bias is more subtle than a conflict of interest. Bias may be alleged if a party believes a Hearing Officer has either

prejudged the case based on prior rulings or an expressed an attitude toward an issue, or displayed partiality, animosity or favoritism.

Prior rulings in the same or similar case, or a point of view or prejudgment about regulations, policies or laws are rarely grounds for disqualification or recusal. However, personal bias can be, if proven or admitted. The ethical responsibilities of a Hearing Officer require recusal if personal bias will affect impartiality.

When bias is alleged, the Hearing Officer will notify the supervisor and may recuse him/herself. If the Hearing Officer believes the allegations are without merit, a notation of the allegation and the assessment shall be placed in the case record.

**F. Responsibilities of the Hearing Officer.** Hearing Officers shall be fair and impartial; obtain all facts needed to make a determination; conduct a hearing that affords all participants their rights; prepare a sound, well-supported determination; and limit the determination to the extent of their authority. The appeal determination is USDA's final determination if no review is requested.

**1. *Conduct.*** A Hearing Officer's behavior, inside and outside the hearing room, will influence public confidence in NAD. To encourage public trust, a Hearing Officer should:

- review the case file and be prepared for the assigned case;
- be courteous to all, regardless of their behavior;
- allow parties to present their views;
- listen carefully and attentively;
- maintain dignity and decorum;
- be conscious of nonverbal as well as verbal communication;
- not prejudge the outcome of the case;
- not indicate the expected outcome until the determination is issued; and
- treat all with respect.

**2. *Fairness and impartiality.*** The Hearing Officer shall be fair and impartial; avoid bias based on race, color, national origin, sex, religion, age, disability, political beliefs, sexual orientation, marital status or family status; exhibit no bias in favor of any party, and must prevent personal or political beliefs from influencing the outcome of a case. The appearance of fairness is as important as fairness itself.

**3. *Finding the facts.*** The Hearing Officer is responsible for gathering all information to make and support a determination.

**a. *Verification of timeliness and appellant(s).*** Although the regional office will evaluate the appeal request before it is assigned, the Hearing Officer shall determine that the appeal request was timely and the appellant(s) are correctly identified. Special care should be taken to ascertain whether married couples are both appellants or whether the adverse decision affects only the husband or the wife. When both husband and wife are appellants, both shall be named in the case caption and in all correspondence. Likewise, the Hearing Officer will verify the identity of the appellant in cases involving partnerships, corporations, and other entities.

**b. *The Hearing Officer as information gatherer.*** In most cases, the parties will provide the information needed through documents and witnesses. The Hearing Officer should limit questions to those needed to obtain information not otherwise provided. The Hearing Officer may question parties and witnesses, but should allow the parties to present their case before asking questions. The Hearing Officer should not dominate the questioning.

If a party is not represented, the Hearing Officer may ask questions relevant to the issues in the case, but must not become an advocate for either party.

**c. *New information and evidence.***

**i. *De novo review.*** Division appeals are *de novo*, or “new”, examinations of an issue. The Hearing Officer is not limited to the information in the agency record or to evidence known to the agency at the time the adverse decision was made as specified in **7 CFR §11.8 (b)(3)** nor is the Hearing Officer bound by previous findings of facts on which the agency’s adverse decision was based.

**ii. *Collateral estoppel.*** The Hearing Officer may be bound by the doctrine of “collateral estoppel.” That is, a Hearing Officer should not issue a contrary factual determination regarding the same appellant in a different matter where that factual determination was directly addressed in the other matter. Collateral estoppel may be raised by any party.

**4. *Establishing a complete record.*** The Hearing Officer must establish a complete record of the appeal. Subsequent review of the determination

requires that all aspects of the appeal, from the organization of the information through the maintenance of an audible, complete tape recording, be organized and thorough.



## SECTION 2 - APPEALABILITY

### I. GENERAL (7 CFR § 11.6)

NAD has the authority to adjudicate only certain decisions made by an agency. An administrative decision by an agency that is adverse to a participant is appealable to NAD. Some decisions are considered to be “matters of general applicability” and are not appealable. Such matters are not appealable even if the agency inadvertently granted appeal rights. Also, NAD procedures may not be used to seek review of statutes or regulations.

NAD has the authority to determine whether an adverse decision is appealable. If an agency rules that a decision is not appealable, it must grant the participant a right to seek review of that ruling from the Director or his/her designee. An appealability review will determine whether the decision is adverse to the individual participant and therefore appealable, or a matter of general applicability and therefore not appealable. An appealability determination is final and cannot be appealed.

### II. APPEALABILITY REVIEW RIGHTS

When an agency rules that a decision is not appealable, the participant must be given the right to seek a review of that determination of appealability. A grant of review rights should state that the review request must be received by NAD within 30 days of receipt of the adverse decision, be personally signed, and should include a copy of the decision and an explanation of why the participant believes it is appealable. The address of the appropriate NAD regional office should be given. An acceptable form of appealability review rights is:

This decision is not appealable. However, you may request that the National Appeals Division review our determination that this decision may not be appealed in accordance with Title 7 of the Code of Federal Regulations Part 11. Your written request for review must be submitted no later than 30 days from the date of receipt of this letter and must be personally signed by you. Send the request to National Appeals Division, [address]. Include a copy of this letter and a statement explaining why you think the decision is appealable. A copy of your appeal and attachments should be sent to this office. The request should include your name, address, and phone number.

### III. THE APPEALABILITY REVIEW PROCESS

A. **Timing of requests.** A participant who has been notified by an agency that an adverse decision is not appealable may file a request for an appealability review no later than 30 days after receipt of the agency ruling of nonappealability. **7 CFR §11.6(a)(1).**

B. **Content.** An appealability review request must be in writing and may be delivered by facsimile, mail or delivery service. The rules applicable to filing an

appeal apply as specified in **7 CFR§11.14**. The participant need only allege facts to show that the adverse decision is individual to him/her and not a matter of general applicability. It is not necessary to submit evidence to dispute the adverse decision; an appealability review determines only if an adverse decision may be appealed, not whether the agency erred in the decision.

**C. Opportunity to comment.** After receipt of an appealability review request from a participant, NAD may notify the participant and the agency of the appealability review and may ask the parties to submit additional information.

**D. Effect of the appealability review.** An appealability review determines whether an adverse decision may be appealed to NAD. The appealability determination makes no judgment on the merits of the case and carries no weight in any subsequent appeal.

A finding of appealability does not automatically initiate an appeal. If an adverse decision is found to be appealable, the participant will be informed of the right to appeal the decision. An appeal request must be submitted within 30 days of receipt of the appealability determination.

**E. Ex Parte.** The ex parte rules that apply to appeals (**see Section 1. III. D**) do not apply to appealability reviews. The participant or the agency may be contacted by NAD without notice to the other party; however, such communication generally will be limited to requests for information or clarification.

**F. Appealability issues during a hearing.** In rare instances, the issue of appealability may arise in the course of a hearing. The Hearing Officer will consult with his/her supervisor about how to proceed.

## SECTION 3 - APPEALS

### I. GENERAL

#### A. **Jurisdiction. (7 CFR §11.3)**

NAD has the authority to hear appeals of adverse decisions or the failure of an agency to act. **7 U. S. C. §6992(d) and 7 CFR §11.1 and 11.3(a).** Questions of jurisdiction occasionally arise. An agency decision may be silent regarding appeal rights or may grant appeal rights in error.

Occasionally, appeal requests may not be perfected or may relate to matters outside the jurisdiction of NAD. Requests may not identify a specific adverse decision or failure to act by the agency. Requests may be premature, when a requester is anticipating an adverse decision, or imprecise, when a requester is merely dissatisfied with agency policy or procedure but has not received an appealable adverse decision. Such requests will not be accepted.

An appeal is perfected when it is received within the appropriate time frame, is personally signed by the appellant(s) and adequately identifies the adverse decision being appealed.

NAD has no jurisdiction to hear challenges to the validity of laws and regulations. Appeals based on allegations that regulations are not consistent with the intent of Congress will not be accepted. **7 CFR §11.3(b).**

NAD has jurisdiction over timely filed appeals. Requests filed after the deadline will not be accepted. Time is determined from the date of receipt by an appellant of the adverse decision. If the date is not known or is not reported by the appellant, seven days ordinarily is considered for delivery in establishing the date of receipt.

If the appeal request raises jurisdictional issues (for example, the requester may not be a proper participant), the case may be assigned to a Hearing Officer to determine the jurisdictional matter.

**B. Dismissal of appeals.** There are several reasons why an appeal may be dismissed:

**1. *Bankruptcy.*** Appeals of appellants who have filed for bankruptcy protection will be dismissed without prejudice by the Hearing Officer or Regional Assistant Director unless the bankruptcy court has lifted the automatic stay or otherwise permits the appeal. This applies in all bankruptcy cases, even if the appellant is operating under a confirmed plan in chapters 11, 12, or 13. If the appellant files for bankruptcy during an appeal, the appeal will be dismissed without prejudice. No review rights are given.

**2. *Lack of jurisdiction.*** An appeal may be dismissed if NAD lacks jurisdiction to adjudicate the case.

NAD will dismiss an appeal request, with no review rights, that does not identify an adverse decision or failure of the agency to act (**see Appendix 3**).

If the agency rescinds the adverse decision, NAD's jurisdiction ends. The appellant may withdraw the appeal request or NAD may dismiss the appeal. Review rights are given.

If, on the face of the appeal, NAD has no jurisdiction, the appeal will be dismissed without review rights (**see Appendix 3**).

If NAD appears to lack jurisdiction, the parties will be notified and given 10 days to respond (**see Appendix 3**). In some instances, a prehearing conference and/or hearing may be held. If, after consideration of the parties' submissions, it is determined that there is no jurisdiction over the appeal, the case will be dismissed for lack of jurisdiction and review rights will be given (**see Appendix 3**).

**3. *Late-filed appeal requests.*** Late-filed appeal requests will be dismissed. If a late-filed case is accepted erroneously, the Hearing Officer, upon discovering that the appeal request was not timely, should contact his/her supervisor for guidance. A Regional Assistant Director may deem an appeal filed on a timely basis if a participant corrects administrative oversights within a reasonable time, as established by the Regional Assistant Director.

## **C. Mediation and Alternative Dispute Resolution.**

**1. *Mediation request before appeal request.*** If an appellant requests mediation or Alternative Dispute Resolution (ADR) after the issuance of appeal rights, but before filing a request for appeal, the 30-day period for requesting an appeal stops running when the mediation request is made. If mediation concludes unsuccessfully, the appellant has the balance of the 30 days within which to file an appeal request, if desired, as specified in **7 CFR §11.5(c)(1)**. The unsuccessful conclusion of mediation or ADR does not constitute a new adverse decision with a new 30-day appeal-request period.

If mediation or ADR is requested more than 30 days after receipt of the adverse decision, and no appeal has been requested, the adverse decision cannot be appealed.

**2. *Mediation request after appeal request.*** A request for mediation or ADR may be requested after an appeal request is filed. In such cases, the participant will be deemed to have waived the right to a hearing within 45 days of NAD's receipt of the request for appeal. If mediation or ADR is unsuccessful, the participant has the right to a hearing within 45 days of the conclusion of mediation or ADR as specified in **7 CFR §11.5(c)(2)**.

**3. *Mediation request with appeal request.*** A request for mediation or ADR and a request for appeal may be filed simultaneously. When this occurs, the appeal will be accepted and immediately suspended pending the outcome of mediation. The appeal may be timely pursued if mediation or ADR is unsuccessful.

**D. Suspension of appeals.** Appeals may be suspended before the completion of the hearing. Hearing Officers do not have the authority to suspend cases. The Regional Assistant Director may suspend a case on his/her own initiative or upon the request of a Hearing Officer. The basis for a suspension shall be documented in the case record.

Suspensions will be granted only for good cause and for the shortest reasonable time, based on the circumstances in the individual case. Except as noted, the length of a suspension is at the sole discretion of the Regional Assistant Director, who will review the suspension at least every 60 days.

Appellants requesting suspensions waive the right to a hearing within 45 days of NAD's receipt of the adverse decision. (Note that brief delays may not require a suspension, although they may require a waiver. Extended delays require either a suspension or a waiver.) All parties will be notified when the suspension is lifted. Reasons for suspensions:

**1. *Mediation and ADR (see Mediation and Alternative Dispute Resolutions, above.)***

**2. *Litigation.*** When it becomes known that the issue in an appeal is within the jurisdiction of a court, the Hearing Officer shall notify the Regional Assistant Director. The appropriate government attorney's office shall be contacted, and the Regional Assistant Director will decide whether to suspend the appeal.

**3. *Discrimination complaints.*** If an appellant files a discrimination complaint with the USDA Office of Civil Rights concerning matters in an appeal, NAD usually will not suspend the case; however, a Regional Assistant Director may suspend the appeal. If an appellant is part of an active class action civil rights suit, NAD usually will not suspend the case; however, a Regional Assistant Director may suspend such an appeal.

**4. *Other reasons for suspension of appeals.*** NAD may suspend cases for other reasons, such as illness or other unexpected temporary unavailability of a party or an essential witness.

**E. Briefs.** Written statements supporting a party's arguments (briefs) may be helpful in resolving and narrowing the issues involved in an appeal. If a party submits a brief, the Hearing Officer shall allow the other parties to file a brief. There is no required format for briefs. Briefs filed with the Hearing Officer shall be served on all parties. A Hearing Officer may limit the number of pages that may be included in a brief.

**F. Good Cause.** A showing of good cause is required in some cases involving failure of a party, witness or representative to satisfy certain time requirements as specified in **7 CFR §11.8(c)(6)**. Good cause is demonstrated when due diligence or prudence are exercised. In determining whether good cause has been shown, the Hearing Officer or NAD will consider the length of the delay, the reasonableness of the excuse, a showing of due diligence, or evidence of the existence of circumstances beyond the party's control. Good cause may include an illness or injury that precludes attendance, weather or road conditions that make travel impossible or inadvisable, or other situation that would have affected a reasonable person in a similar manner.

**G. Freedom of Information Act.** Freedom of Information Act (FOIA) requests must be in writing. They may be submitted through the regional office to the NAD External Affairs Officer as specified in **7 CFR §§ 11.30 through 11.33**.

Appeals will not be suspended to allow for the procurement of materials through FOIA requests filed with NAD or any other agency.

**H. Congressional correspondence.** Written inquiries from Members of Congress shall be answered in writing and signed by an appropriate NAD official. All case-related correspondence and responses should be filed in the case record.

Verbal inquiries from Members of Congress must be referred to the Regional Assistant Director or to the NAD External Affairs Officer. A memorandum of the communication shall be filed in the case record and a copy provided to the External Affairs Officer.

## **II. APPEAL RIGHTS**

The right to appeal an adverse decision, or failure to act, is provided by statute. Adverse decisions should include notice of a participant's appeal rights. Regulations do not prescribe a form for such; any appropriate language is acceptable. Appeal rights should state, at a minimum, four items: (1) the appeal must be received by NAD within 30 days of receipt of the adverse decision; (2) must be personally signed; (3) should include a copy of the adverse decision; and (4) should include an explanation of why the

participant believes the adverse decision is not correct. The address of the appropriate NAD regional office should be given. An acceptable notice of appeal rights is:

You have the right to appeal this decision in accordance with Title 7 of the Code of Federal Regulations Part 11. In an appeal you must prove that the decision is erroneous. If you wish to appeal this decision, your written request for appeal must be submitted no later than 30 days from the date of receipt of this letter and must be personally signed by you. Send the request to National Appeals Division, [address]. Include a copy of this letter and a statement explaining why you think the decision is erroneous. A copy of your appeal request and attachments should be sent to this office. The request should include your name, address, and phone number.

### III. REQUEST FOR APPEAL

#### A. Who may appeal.

**1. *Form of appeal request.*** A request for appeal must be in writing and signed by the participant, appropriate corporate or entity officer, or executor of an estate. Requests sent by regular mail, a delivery service, or facsimile are acceptable, and are deemed filed when postmarked or delivered to NAD.

**2. *Recipients of adverse decisions.*** Participants in, or applicants for, programs administered by USDA agencies designated by laws and regulations may appeal adverse decisions by those agencies. An applicant or participant may be an individual or an entity (corporation, partnership, joint venture, etc.). An adverse decision is a decision by an officer, employee, or committee of an agency that is adverse to a participant. This includes a denial of equitable relief by an agency or the failure of an agency to issue a decision or otherwise act on the request or the right of the participant within time frames specified by agency laws or regulations or within a reasonable time as specified in **7 CFR § 11.1**.

Only program decisions of agencies specified in laws or regulations may be appealed. Employment disputes, matters under the jurisdiction of the Board of Contract Appeals, matters of general applicability, decisions by agencies other than those specified in laws or regulations, and certain other matters are not appealable to NAD as specified in **7 CFR §§11.1 and 11.6**.

Agencies whose adverse decisions are adjudicated by NAD are:

- the Farm Service Agency (FSA);
- the Risk Management Agency (RMA);
- the Natural Resources and Conservation Service (NRCS);

- the Commodity Credit Corporation (CCC);
- the Federal Crop Insurance Corporation (FCIC);
- Rural Development (RD);
- the Rural Housing Service (RHS);
- the Rural Business-Cooperative Service (RBCS) and
- the Rural Utilities Service (RUS)(for certain programs). **7 U. S. C. §6991(2) and 7 CFR §11.1.**

**3. *Partnerships/corporations/other entities.*** Program participants may include partnerships, corporations and other entities. An appeal request from a partnership may be signed by any partner. An appeal from a corporation or entity may be signed by an officer of the corporation or entity. NAD may require proof that the signer is authorized to represent the entity.

**4. *Power of Attorney.*** The fact that a person is represented does not change the obligation that a participant personally signs the request for a hearing. Note that a general power of attorney provides an insufficient basis on which to represent a participant before NAD. **7 CFR §11.6(c)** requires a representative to file a declaration with NAD that the participant has authorized representation for purposes of appealing the specified adverse decision. The declaration must be executed in accordance with **28 U.S.C. 1746**, which requires that the declaration include a statement in substantially the following form:

If executed within the United States, its territories, possessions, or commonwealths: “I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature).”

The declaration must also include, as an attachment, the representative’s written authorization signed by the participant.

**5. *Representatives without a Power of Attorney.*** When an otherwise timely request for appeal is signed by a representative without appropriate documentation, including an attorney, NAD will notify the sender of the requirement for an original signature and the type of documentation that must be filed in order to represent a participant before NAD. A Regional Assistant Director may deem an appeal filed on a timely basis if a participant corrects these administrative oversights within a reasonable time, as established by the Regional Assistant Director.

**6. *Third Parties and Interested Parties.*** (**7 CFR §11.15**) Parties other than the appellant or the agency may participate in appeals. This includes



parties whose rights may be affected by a NAD determination and those on whom the appeal determination may have a derivative impact.

**a. *Third parties.*** Third parties may participate in an appeal. A third party is any individual or entity for which a NAD determination could lead to an agency action that would be adverse to the party, thus giving the party a right to a hearing. A third party cannot be required to participate in an appeal that may affect his/her rights. However, if a third party declines to participate after being notified of the right to participate, the party is bound by the determination and may not request an appeal of the same issue at a later time.

For example, a participant who shares in a payment with two others may appeal an agency decision granting a 25 percent share of the payment to the appellant. If NAD determines that the agency decision was erroneous and the agency provides the appellant a 50 percent share of the payment, the payments to other recipients would be reduced. If the other recipients had notice and opportunity to participate in the appeal, their rights would have been adjudicated, whether or not they chose to participate. If they had not been notified of their right to participate in the appeal, the determination would not be binding on them.

NAD has an obligation to notify a potential third party of its right to participate in the appeal as an appellant, and its rights to seek Director review of any Hearing Officer determination. NAD may ascertain the existence of potential third parties from the request for appeal and/or agency record. During the prehearing conference, the Hearing Officer should ask the parties if they know of any third parties to the appeal that have not yet been identified. If possible third parties are identified, they should be notified of the right to participate in the appeal (**see Appendix 3**).

A third party is identified in the caption of all issuances related to the appeal and receives all issuances and the appeal determination, even if the third party does not participate in the hearing. If a third party chooses to participate, it will be identified as an appellant in the matter. If a third party does not participate, it will be identified as a third party. (**Note on Privacy Act considerations:** If a third party does not want his/her whereabouts known, the third party's address will be omitted from copies of correspondence to other parties.)

A third party has the right to a 14-day notice of a hearing pursuant to **7 CFR §11.8(c)(3)**. The hearing may be rescheduled to ensure the third party has 14 days notice; this may cause the hearing to be scheduled more than 45 days after NAD's receipt of the request for the

original request for appeal. A written waiver of the right to a hearing within 45 days shall be obtained from the original appellant(s). If an original appellant objects to the rescheduling and refuses to sign a waiver of his/her right to a hearing within 45 days, the Hearing Officer may convene a limited hearing within the 45 days for the purpose of complying with the 45-day rule and continue the hearing to a later date selected to allow for the 14-day notice to the third party.

**b. *Interested parties.* (7 CFR §11.15(b))** Interested parties whose rights are not being adjudicated, but who may be affected by the appeal determination, may participate in appeals. Interested parties are limited to guaranteed lenders and reinsured companies in a crop insurance program. Guaranteed lenders are not required to jointly appeal with borrowers.

Interested parties will be notified when a borrower or insured requests an appeal and may participate in the appeal, but do not become appellants. They are not entitled to a 14-day notice of the hearing and the appeal will not be continued pending notification.

Interested parties are not identified in the case caption. They may not request Director review or reconsideration, but will receive copies of final determinations on request.

**B. Timeliness of appeal requests.** An appeal must be requested no later than 30 days from the day the participant receives the adverse decision. Where there is no adverse decision, the appeal must be requested no later than 30 days from the time the participant knew or reasonably should have known that the agency had not acted within the time frames specified by regulations or, where no time frame is specified, no later than 30 days after the participant reasonably should have known of the agency's failure to act. If an appealability determination was issued by NAD, the appeal must be filed no later than 30 days after the participant receives the appealability determination as specified in **7 CFR §11.6(b)(1)**. The Regional Assistant Director and the Hearing Officer are responsible for determining whether the appeal is timely, (**see 7 CFR §11.14**), and the Regional Assistant Director may deem an appeal filed on a timely basis if a participant corrects the administrative oversights within a reasonable time, as established by the Regional Assistant Director.

#### **IV. ASSIGNMENT OF CASE TO HEARING OFFICER**

**A. Authority.** Assignment of an appeal to a Hearing Officer is at the sole discretion of the Director or his/her designee. A party may object to the assignment on appropriate grounds (**see Conflict of Interest and Bias, Section 1. III. E**).

**B. Assignment of appeals.** Assignments may be based on location of the appellant and the agency office, available hearing sites, security concerns, Hearing Officer caseload, Hearing Officer availability, conflict of interest, and other appropriate factors.

**C. Appeals involving Hearing Officers from other regions.** Appeals may be assigned to a Hearing Officer from a region other than the one in which the appeal arose in order to handle heavy caseloads, substitute for unavailable Hearing Officers, avoid conflicts of interest, and for other reasons.

## **V. PREPARING FOR THE HEARING**

### **A. Responsibilities.**

**1. *Appellant/Participant.*** The appellant will identify witnesses, gather documents and organize his/her presentation. Copies of all submissions must be provided the Hearing Officer, the agency, and other appellants simultaneously. The appellant must inform the regional office and/or the Hearing Officer of any third parties of whom they are aware.

**2. *Regional Office.*** Regional office personnel shall verify the timeliness of the appeal request, acceptability of signature and jurisdiction, notify the appellant and agency decision maker of acceptance of the appeal, assign the case to a Hearing Officer, and record the assignment in the appeal database.

Regional office personnel shall notify the agency of its responsibility to furnish the agency record to the Hearing Officer and the appellant by a specified deadline as specified in **7 CFR §11.8(b)(1)**.

**3. *Hearing Officer.*** The Hearing Officer will determine if there could be a real or perceived conflict of interest, schedule a prehearing conference if appropriate, and issue a notice thereof. To allow all parties and the Hearing Officer an opportunity to review the agency record, a prehearing conference will be scheduled after the date on which the agency record is due. The Hearing Officer will prepare for a prehearing conference and the hearing by studying the documents submitted by the parties, reviewing the regulations and this Guide, and ensuring any needed administrative arrangements, such as translators or accommodations for persons with disabilities.

**4. *Representatives.*** (7 CFR §§11.1 and 11/6(c)) Appellants may represent themselves. Appellants who represent themselves are known as *pro se* appellants.

Appellants may have a representative, at their own expense, who may be a lawyer, friend, family member, accountant, farm manager, advocacy group, or other individual or entity of the appellant's choice. When an appellant is represented, NAD will send copies of all issuances to the representative when they are sent to the parties.

An appellant representative must file a sworn declaration that states that the appellant has authorized him/her in writing to represent him/her for purposes of the particular appeal. The representative must attach a copy of the written authorization to the declaration as specified in **7 CFR §11.6(c)**. Before or at the hearing, the appellant must submit an "Authorization of Representation and Release of Information" and "Declaration of Entry of Appearance" form (see **Appendix 3**). The form is filed in the case record.

**5. Agency.** The agency representative will provide the appellant and the Hearing Officer with a copy of the agency record. The agency record is all materials prepared or reviewed by the agency during its consideration and decision-making, but does not include records or information not related to the adverse decision. All materials in the agency record are deemed admitted as evidence as specified in **7 CFR §11.1**

The agency may be represented by an agency employee and/or, occasionally, by a lawyer from USDA's Office of the General Counsel. Such representatives do not need to file declarations, but the role of each agency employee (agency representative, witness, observer, etc.) at the hearing shall be ascertained by the Hearing Officer and made a part of the record.

**6. Witnesses.** The parties are entitled to present witnesses to provide relevant oral and documentary evidence. Witnesses should limit their testimony to factual information within their personal experience that is relevant and material to the issues on appeal. Witnesses who qualify as experts may present opinion evidence. The Hearing Officer may limit the number of witnesses if the testimony is repetitious or irrelevant. Parties to the appeal have the right to question all witnesses as specified in **7 CFR §11.8(c)(5)(ii)**.

**7. Interlocutory Review (Interim Ruling).** No interlocutory review by the Director of Hearing Officer rulings is permitted as specified in **7 CFR § 11.8(d)**. If a party requests a Director review after receiving the appeal determination, he/she may raise objections at that time.

**B. The prehearing conference. (7 CFR §11.8(c)(4))** Prehearing conferences are anticipated in all appeals. The prehearing conference provides an opportunity to resolve the matter or otherwise narrow the issues involved. Failure

to hold a prehearing conference also may lead to an unsuccessful hearing in which the parties are not prepared, the Hearing Officer is uncertain of the issue, time is wasted on procedural issues that a prehearing could have resolved, and third parties are discovered, delaying the hearing. The Hearing Officer should note in the record any circumstances that obviate the need or opportunity for a prehearing conference.

Prehearing conferences are by telephone, unless the Hearing Officer determines that meeting in person is necessary. The prehearing conference should be scheduled sufficiently early to provide for a hearing within 45 days of receipt of a request for review while allowing the required 14-day notice of hearing.

A notice of the prehearing conference should be sent to all parties. The Hearing Officer may verify the availability of the parties in advance, but prohibited ex parte communication must be avoided during such discussions. The notice of a prehearing conference may be combined with the notice of hearing, but care should be taken to recognize a request for a record review or agreement to a hearing by telephone (**see Appendix 3**).

**1. Purpose.** During the prehearing conference, the parties may clarify issues; define the dispute; determine if there is another pending matter that may bear on the appeal (e.g., bankruptcy or litigation); stipulate to facts or expected testimony; identify third parties; schedule witnesses; ensure that all relevant information will be available; determine the need for accommodations for persons with disabilities; discuss hearing options (conference call, in-person, or record review), and address related concerns. NAD's jurisdiction to hear the appeal may also be addressed (**see 7 CFR §11.1**).

**2. Prehearing conference outline.** During the prehearing conference, the Hearing Officer will:

- identify the case and date of the proceeding and inform participants that the proceedings are being recorded;
- request the parties to introduce themselves and state their role in the appeal;
- determine whether there is litigation or other pending matters between the agency and the appellant, or if the appellant is in bankruptcy. The Hearing Officer should consider whether the appeal should be suspended or dismissed at this point (**see Section 3. I. B.**);
- obtain agreement of the parties as to the adverse decision and the specific issue(s) on appeal;
- determine whether any third parties should be identified. If there are third parties whose rights will be adjudicated during the appeal,

they will be notified of the appeal and the opportunity to participate. The case may need to be suspended or continued and/or the hearing date changed to ensure the rights of third parties (see 7 CFR §11.15 and 1. II. and Section 3. III. A. 6. a.);

- verify that a copy of the agency record has been provided to the appellant and to the Hearing Officer;
- advise the parties concerning the nature of the evidence that may be presented at the hearing;
- explain the hearing process;
- explain how exhibits will be handled during the hearing;
- request the agency to identify the regulations and statutes it believes to be applicable to the adverse decision;
- encourage stipulations to undisputed facts to expedite the hearing;
- obtain agreement among the parties as to the date, time, and location of the hearing and
- determine the need for translators, accommodations for those with disabilities, and other administrative matters.

**3. *Jurisdictional issues.*** When jurisdictional questions exist, the Hearing Officer will:

- request the agency to explain why it believes NAD has no jurisdiction to hear the appeal (such as why the agency's action or failure to act does not constitute an adverse decision) and
- request the appellant to explain why NAD has jurisdiction.

If the Hearing Officer determines that NAD does not have jurisdiction, he/she will write a determination of the lack of jurisdiction and provide review rights to the Director (see **Appendix 3**).

If the Hearing Officer is unable to determine jurisdiction during the prehearing conference, he/she may request additional information from the parties or convene a hearing to receive information and arguments concerning jurisdiction. The Hearing Officer shall issue a determination as to jurisdiction no later than 30 days after the prehearing conference or receipt of additional information from the parties. If NAD is found to have jurisdiction, the appeal will proceed.

**4. *Document submissions.*** (7 CFR Section 11.8(c)) The Hearing Officer may set deadlines for the appellant to submit a statement why he/she believes the decision is wrong, documents not in the agency record that the appellant expects to introduce at the hearing, and a list of anticipated witnesses and brief summary of their testimony.

The Hearing Officer may set deadlines for the agency to submit:

- the adverse decision being challenged;
- the agency record, if not provided previously;
- an explanation of the agency's position, including the regulatory and/or statutory basis for the adverse decision;
- documents not in the agency record that the agency expects to introduce at the hearing, and
- a list of anticipated witnesses and brief summary of their testimony.

Generally, the same deadlines will apply to the appellant and the agency. If a deadline is missed, the evidence or witnesses could be excluded from the hearing. But, to ensure that all relevant information is presented, the Hearing Officer should be as flexible as fairness allows. The hearing may be continued, postponed, or recessed to allow the parties and the Hearing Officer time to review the evidence.

The Hearing Officer is responsible for gathering information from all parties to determine whether the agency's adverse decision was consistent with applicable regulations. The Hearing Officer is not bound by the information available to the agency when the adverse decision was made. **7 CFR §11.8(b)(3).**

**5. *Stipulations.*** Parties may agree (stipulate) to certain facts or expected testimony. Such agreement serves as evidence on an issue at the hearing. The parties need not necessarily submit written stipulations, however, the Hearing Officer shall note oral stipulations for the record and in the prehearing conference report. Once stipulated to, a fact is considered to be uncontested, and evidence and/or arguments to the contrary shall not be accepted by the Hearing Officer, unless the stipulation is withdrawn. Stipulations of expected testimony are considered as if the witness were present and testifying under oath.

**6. *Written prehearing conference report.*** The prehearing conference report shall be provided to all parties and placed in the record. It notes all applicable deadlines, information the parties are to provide, stipulations, and other matters discussed during the prehearing (**see Appendix 3**). A prehearing conference report is necessary in complex cases, such as those involving multiple parties, a complex determination, or numerous disputed issues and stipulations, and in a case that is transferred to another Hearing Officer after the prehearing conference.

### **C. Other prehearing issues.**

**1. *Prehearing conference briefs.*** Briefs are generally not needed for the prehearing phase of the appeal, but will be accepted if submitted and may be useful in complex cases. If one party submits a brief, the other party

will be provided an opportunity to submit a reply brief. The Hearing Officer may set reasonable deadlines for the submission of briefs. All briefs become part of the record.

**2. *Failure to appear at prehearing conference.* (See *Failure to Appear, Section 3, VI. E.*)** If a party does not participate in the prehearing conference, the proceeding may continue with a discussion of procedural matters related to the appeal. For example, if the agency representative does not participate, the appellant may specify the manner of the hearing and a hearing date can be set. If the appellant does not participate, the Hearing Officer should determine whether the agency has provided a copy of the agency record to the appellant. Following the prehearing conference, the Hearing Officer should attempt to contact the appellant to determine the manner of the hearing and to set a hearing date.

On a showing of good cause for failure of a party to participate, another prehearing conference may be scheduled, if required.

**3. *Joint hearings.***

**a. *Same appellant, several adverse decisions.*** If appeals involving related issues are filed by a party, they may be heard together.

**b. *Different appellants, related adverse decisions.*** If different appellants file related appeals, they may be heard together. Any appellant who does not wish to be joined may request a separate hearing.

**4. *Document exchanges.*** The parties should provide copies of documents they intend to introduce into evidence to all other parties and the Hearing Officer before the hearing. Any documents provided to the Hearing Officer without evidence that they were provided to the other parties may be disregarded at the discretion of the Hearing Officer. The Hearing Officer shall note the exclusion of such documents from consideration and place a copy in the record. The Hearing Officer may exercise liberal discretion with respect to *pro se* appellants. Ex parte requirements will be observed.

**5. *Document labeling.*** All exhibits should be labeled before the hearing. Labeling methods are provided to the parties with the Notice of Appeal. Appellant exhibits are identified in the lower right corner as: Appellant Exhibit A, page 1 of \_\_\_\_, Appellant Exhibit B, page 1 of \_\_\_\_, etc. Each page of each exhibit must be numbered.

Each page of the agency record must be numbered in the lower right corner in sequential order. Cover memos are considered part of the



agency record and should bear a page number, in appropriate order. An agency record should have only one sequence of numbers; separate documents or sections should not begin with a new numbering sequence.

Agency documents not included in the agency record may be submitted as agency exhibits. Agency exhibits should be identified in the lower right corner as: Agency Exhibit 1, page 1 of \_\_\_, Agency Exhibit 2, page 1 of \_\_\_, etc. Each page of each exhibit must be numbered. Agency exhibits should not duplicate documents in the agency record. The agency representative is responsible for providing all agency regulations, laws and procedures or policies underlying the adverse decision.

In cases with multiple appellants, each appellant may submit exhibits. Exhibits submitted by each appellant must be separately numbered and identified with the appellant's name.

If documents are not labeled correctly, the Hearing Officer may return the documents for relabeling. In the case of a telephone hearing, the Hearing Officer may relabel exhibits already received. The unlabeled or incorrectly labeled documents are not accepted into the case record.

It is important that the Hearing Officer require hearing participants to clearly identify any documents to which they refer. A Hearing Officer should interrupt a party's testimony to ask the party to identify the document to which it is referring. Similarly, if a party points to a particular document, the Hearing Officer should describe for the record what is occurring at the hearing.

**6. *Agency record.*** The agency should submit the agency record before the prehearing conference. The agency record is limited to all materials considered by the agency in making the adverse decision and should not contain documents concerning matters that occurred after the adverse decision.

All parties are entitled to a copy of the agency record. Questions concerning the completeness and accuracy of the agency record may be addressed at the prehearing conference.

**7. *Discovery.*** Discovery is a method by which parties obtain evidence from one another. Discovery may include depositions (testimony given outside the hearing under oath), interrogatories (written questions and answers), and document requests. The parties may agree among themselves to engage in discovery, but the Hearing Officer cannot compel discovery. When appropriate, appellant-requested agency witnesses will be made available. Otherwise, with the Director's concurrence, the Hearing Officer may issue subpoenas for witnesses and documents.

**8. Accommodations for persons with disabilities.** The Hearing Officer will determine if anyone involved in a case requires a sign language interpreter, wheelchair access, large print documents, or other accommodations for persons with disabilities. Service animals are permitted at all hearings without prior notice. In some cases, accommodation may require a change in hearing location. NAD will arrange for any needed accommodations at government expense.

**9. Language interpreters and translators.** If a party or essential witness requires a foreign language interpreter, the Hearing Officer and the Regional Assistant Director will arrange for them at government expense.

**10. Tape recording.** Prehearing conferences are recorded by the Hearing Officer. The parties will be notified that the proceedings are being recorded. The Hearing Officer will test the equipment to ensure that all voices are audible. The tape recording becomes part of the case record, and the parties may request copies free-of-charge. Any other recordings of the proceedings will not be considered the official record.

Prior to the prehearing conference, either party may request that a verbatim transcript of the conference be made. When a verbatim transcript is made, it will be the official record of the prehearing conference. The party requesting the transcript will pay for the service, provide a certified copy of the transcript free of charge to the Hearing Officer, and allow the other parties to purchase a copy from the transcription service. When a transcript is provided, it is placed in the case record with the tape as specified in **7 CFR 1.8(c)(5)(iii)**.

It is important that everyone participating in the prehearing conference identify him/herself for the record. Anyone listening to the tape should be able to identify each speaker, and to determine which documents are being referenced. The Hearing Officer shall ensure that the official recording is clear to future listeners.

The prehearing conference and hearing shall be on separate tapes, regardless of the length of the proceedings. All tapes must be labeled. Tapes of the prehearing conference are labeled and numbered and become part of the case file. If any tapes are damaged, **see Deficient Hearing Tapes, Section 3. VIII. D.**

**11. Scheduling the hearing.** An appellant has the right, if he or she so chooses, to appear in person before a NAD Hearing Officer. Hearings may also be conducted by telephone. An appellant may also choose to proceed

by a review of the written record. The options are listed on the NAD Information Sheet provided to the parties with the Notice of Appeal.

An in-person hearing will be held in the appellant's State of residence or at a location otherwise convenient to the appellant, the agency, and NAD as specified in **7 CFR §11.8(c)(3)**.

Parties must have a 14-day notice of the hearing as specified in **7 CFR §11.8**. A neutral site will be used. A hearing should not be held in the appellant's home or business or the agency office. A handicapped accessible site may be required. In determining the hearing site, the Hearing Officer may need to consult with his/her supervisor, especially if security is an issue.

Hearings should not be scheduled late in the day, unless the hearing can be completed that day or the parties are available the next day. When a multi-day hearing is anticipated, all parties should be informed. When circumstances warrant, a hearing may continue on the following day, even when not anticipated before the hearing and even if no notice was given to the parties of the possibility of a two-day hearing.

The appellant has the right to a hearing within 45 days of receipt of the appeal request, but may waive that right as specified in **7 CFR §§11.5(c)(2) and 11.8(c)(1)**. If the appellant requests a postponement of the hearing, the time limit may not be met and a waiver should be signed. If another party seeks a postponement and the 45-day period would be exceeded, the appellant must agree. Delays beyond 45 days must be justified in writing; those designed merely to delay proceedings will not be authorized.

A Hearing Officer should reschedule a hearing only once, no more than 30 days from the original hearing date. Additional or lengthy postponements should be approved by the Regional Assistant Director. Rescheduling requests must be documented in writing in the case file.

**12. Subpoenas. (7 CFR Section 11.8(a)(2) and (3))** Subpoenas may require the production of evidence or the attendance of a witness. A Hearing Officer may, with the concurrence of the Director, issue subpoenas for witnesses or documents. A subpoena will not be issued unless the information sought cannot be obtained without it.

Subpoenas may be issued at the request of either party. In rare cases, the Hearing Officer may initiate a subpoena request if he/she believes the information is needed, will not be produced otherwise, and has not been requested by a party.

Subpoenas ordinarily are not necessary to produce witnesses or documents from the agency. The agency is responsible for ensuring the participation of any USDA employee who is called as a witness by either party.

**a. Subpoena requiring production of documents.** A subpoena requiring production of documents may be requested and issued at any time while the case is pending as specified in **7 CFR §11.8(a)(2)(i)**. Such a subpoena may be issued only if the evidence sought is necessary and reasonably calculated to lead to information that would affect the final determination, or necessary to fully present the case as specified in **7 CFR §11.8(a)(2)(iii)(A)**. The party requesting the subpoena must establish such and demonstrate that he/she has attempted to otherwise secure the evidence. The party also must proffer a showing of the relevant and material information in the documents to be obtained by subpoena.

**b. Subpoena requiring attendance of witness.** A request for a witness subpoena must be submitted in writing at least 14 days before the scheduled date of a hearing, and must be issued, if at all, at least seven days before the hearing. A subpoena will be issued if the witness possesses information that is necessary to disclose all relevant facts that could affect the final determination, if the information is available only through the testimony of that person, and if the testimony cannot be obtained without a subpoena as specified in **7 CFR §11.8(a)(2)(iii)(B)**. The party requesting the subpoena must establish such and demonstrate that he/she has attempted to get the testimony without a subpoena. Such information must identify relevant and material testimony that the subpoenaed witness is expected to offer.

The subpoena may provide that testimony will be presented in person or by telephone as specified in **7 CFR §11.8(a)(3)**.

**c. Subpoena on request of the Hearing Officer.** A Hearing Officer may request the Director's concurrence for issuance of a subpoena on his/her own motion if the Hearing Officer believes that essential information will not otherwise be produced. Such action will occur only if the hearing record would be inadequate without the testimony or documents. The Hearing Officer follows the same procedures as a party in justifying the need for the subpoena.

**d. Issuing the subpoena.** If the Hearing Officer determines that issuance of a subpoena is required, he/she shall forward a completed subpoena checklist through the Regional Assistant Director to the Director. If the Director does not concur, no subpoena will be issued and the Hearing Officer shall notify the parties. Denial of the

subpoena may be raised on Director review or on judicial review of a final NAD determination.

If the Director concurs, the Hearing Officer signs the subpoena and delivers it to the requesting party who is responsible for arranging for service. Service may be by certified or registered mail or in person by anyone at least 18 years old. Proof of service is certified to the issuer of the subpoena showing the date and manner of service and the name of the server or return receipt

**e. *Costs.* (7 CFR §11.8(a)(2)(v))** The requesting party is responsible for travel and reasonable costs and fees of the server and the subpoenaed witness. However, USDA pays the costs associated with the appearance of a Department employee whose role as a witness is related to his/her official duties, regardless of which party requested the subpoena. Failure to pay the appropriate costs may result in striking the testimony of the witness and the evidence subpoenaed.

**f. *Failure to comply with subpoena.* (7 CFR §11.8(a)(2)(vi))** If a subpoena is not complied with, the Hearing Officer will contact the regional office. The Director may refer the matter to the Department of Justice to enforce the subpoena in a U.S. District Court.

## **VI. THE HEARING**

An appellant has a right to a hearing within 45 days of receipt of a perfected appeal request. The hearing is the opportunity for the appellant and the agency to present evidence relevant to the adverse decision.

Hearings may be held in person or by telephone as specified in **7 CFR §11.8(a)(5)(i)**. The appellant may request a review of the record by the Hearing Officer as specified in **7 CFR §11.6(b)(2)**.

**A. Security.** No Hearing Officer, appellant, witness, or agency employee should be endangered during a hearing. Security ordinarily is not a concern in most hearings and any approved location can be used. Such locations include public libraries, meeting space in commercial buildings (such as banks and hotels), and Federal buildings. However, the Hearing Officer may determine that his/her safety or that of a party or witness requires a secure hearing site. A hearing may be relocated to a courthouse, Federal building or other location where adequate security is available. In extreme cases, the hearing may be postponed until adequate security procedures or an alternate site can be arranged.

If a physical confrontation has occurred or if the Hearing Officer believes that an incident represents an immediate threat, local law enforcement authorities should be called immediately.

**B. The Hearing.**

**1. *Attendance sheet.*** All persons participating in the hearing, including witnesses, should sign and complete the attendance sheet (**see Appendix 3**). For a telephone hearing, the Hearing Officer will obtain the appropriate information from those participating in the appeal at the start of the hearing and complete the attendance sheet.

For in-person hearings, the original signed attendance sheet is placed in the case record.

**2. *Attendance of nonparties.*** Occasionally, nonparties may wish to attend all or part of a hearing. Such individuals may include members of the press, representatives of a Member of Congress, friends of the parties, or other observers.

As a general rule, NAD hearings are open to the public. Nonparties generally are not permitted to participate in any way. If the appellant objects to the presence of any individual, the Hearing Officer will consider the objection and determine whether the individual may remain or whether the hearing, or a portion of the hearing should be closed. The Hearing Officer may recess the hearing to confer with his/her supervisor. A third party or interested party, as defined by **7 CFR §11.15**, cannot be excluded from a hearing, despite an appellant's objection.

**3. *Witnesses.*** There are two types of witnesses: fact witnesses and expert witnesses. Fact witnesses are those individuals that have personal, first-hand information about facts that are relevant and material to the matter under consideration. For example, an employee of a county office may have participated in a conversation with a producer that is important to the outcome of a case. Expert witnesses are those individuals, who by training and experience, are qualified to testify as to their opinion about a situation or a hypothetical situation. As an initial matter, if an expert is offered for testimony, the Hearing Officer should qualify that individual as an expert. This is done by reviewing the expert's credentials at the hearing and subjecting him or her to cross examination about those credentials. In many instances, the parties will stipulate to the qualifications of the expert. There is generally no need for expert witnesses to opine about the proper interpretation of regulations, and county office personnel should not be allowed to testify as expert witnesses. The Hearing Officer should ordinarily sequester fact witnesses (remove them from the hearing room) until they are called to testify. The Hearing Officer may exclude unduly repetitive, irrelevant or immaterial testimony. The credibility of the witness is considered by the Hearing Officer in arriving at a determination. For example, a witness may appear to be honest in response to questions, but be impeached by other evidence in the hearing.

**4. *Control of the hearing.*** The Hearing Officer presides over the hearing and controls the proceeding. The hearing will be conducted in accordance with established guidance in the manner most likely to obtain facts most relevant to the matters at issue. The Hearing Officer directs the parties during the hearing, maintaining order while ensuring all parties have the opportunity to present their evidence and arguments without interruption. Each phase of the hearing (opening statements, evidence, and closing statements) should be identified by the Hearing Officer as it occurs for the hearing record.

No interlocutory rulings are permitted as specified in **7 CFR §11.8(d)**. The Hearing Officer's rulings during the hearing are final. Objections are noted for the record.

**5. *Affirmations (Oaths).*** Hearing Officers have the authority to administer oaths and affirmations (**see Appendix 3**). All individuals who testify at a hearing should be sworn in. Parties to the appeal, including representatives, who do not testify should not be sworn in. If, in the course of an appeal, a representative chooses to testify, such will be under oath or affirmation.

Interpreters, both foreign language and sign language for the hearing-impaired, are sworn in. Interpreters should be instructed to translate exactly what is said, without paraphrasing or changing the testimony in any way.

**6. *Tape recording.* (7 CFR §11.8(c)(5)(iii))** All hearings will be tape recorded by the Hearing Officer. The parties shall be notified that the proceedings are being recorded and asked to acknowledge their awareness of the recording. The Hearing Officer will test the equipment at the start of each audiocassette to ensure that all voices are audible. Upon written request, parties may obtain copies of the tape at government expense.

Prior to the hearing, parties may request that a verbatim transcript of the hearing be made. When a verbatim transcript is made, it will be the official record of the hearing. The party requesting the transcript will pay for the service, provide a certified copy of the transcript, free-of-charge, to the Hearing Officer, and allow the other parties to purchase a copy from the transcription service. When a transcript is provided, it is placed in the case record with the tape as specified in **7 CFR §11.8(c)(5)(iii)**.

Parties and witnesses should identify themselves when they speak to avoid confusion. The Hearing Officer is responsible for ensuring that the identity of speakers is clear and confirm the quality of the recording periodically during the proceeding.

The Hearing Officer will monitor the taping process so the proceeding can be paused and the tape changed without loss of evidence. If the Hearing Officer does not note the end of the tape and part of the hearing occurs before a new tape is inserted, the Hearing Officer will review the previous tape to determine when recording ended and, with the parties' concurrence, summarize any matters not recorded. If the tape recording is defective, see **Deficient Hearing Tapes, Section 3. VIII. D.**

All tapes must be labeled and made part of the case file.

**7. *Hearing format.*** The hearing will be conducted in a manner most likely to obtain the facts relevant to matters at issue as specified in **7 CFR §11.8(a)(5)(ii)**. Therefore, procedures should conform to the hearing format (see **Appendix 3**). This ensures that all requirements of the hearing have been met and that all parties have a full and fair opportunity to present their cases. The Hearing Officer should follow the language in the format.



**8. *Hearing Officer's opening statement.*** The Hearing Officer, as presiding officer, begins the hearing with an opening statement that includes:

- the Hearing Officer's name and title;
- the date, time, and location of hearing;
- the identity of appellant, agency, third parties or interested parties;
- an announcement that the hearing is being recorded and that parties may request copies of the tape free of charge;
- a description of the authority for the hearing, the NAD Case Number, and the adverse decision on appeal;
- a request that everyone present identify themselves and state why they are present (e.g., appellant, representatives, witnesses, family, other);
- a description of the hearing process, explanation of the procedures and elements of the hearing and the rights of the parties;
- ensuring that authorized representatives have filed the required declaration, as specified in **7 CFR §11.6(c)**. If the determination has not been filed, the Hearing Officer should explain the requirement and seek assurance that the requirement will be met within a reasonable time period;
- a request for any preliminary questions;
- the acceptance of the agency record;
- the administration of the oath and
- any stipulations.

The Hearing Officer shall swear in witnesses, including any party testifying. Appellants' representatives are not sworn in unless they will testify.

**9. *The parties' opening statements.*** Each party, including third parties, may make an opening statement to summarize positions and arguments. No evidence should be offered during opening statements. Opening statements may be in any appropriate form and need not be submitted in writing. Opening statements are not interrupted for questions, except for clarification. In general, the appellant presents the first opening statement, unless the Hearing Officer believes it beneficial to hear the agency first.

**10. *Burden of proof.*** The appellant has the burden of proving that the agency's adverse decision was erroneous by a preponderance of the evidence. (**7 CFR §11.8(e)**) That is, the appellant shall prove that the

agency erred in finding the facts or in applying its regulations. With respect to the Hearing Officer's determination as to agency error, that decision must be consistent with the laws and regulations of the agency, and with their generally applicable interpretations as specified in **7 CFR §11.10(b)**.

**11. Evidence.** The Hearing Officer is responsible for obtaining all facts relevant and material to the matters at issue, but does not act, and should avoid the appearance of acting, as an advocate for any party.

Evidence can be oral or documentary. All testimony shall be under oath. All documents shall be material and relevant. Any evidence may be received by the Hearing Officer without regard to whether that evidence could be admitted in judicial proceedings as specified in **7 CFR §11.8(c)(5)(ii)**.

**a. Agency record.** (See **Section 1. II.**) The Hearing Officer shall accept the agency record and ensure it contains all materials on which the agency relied to make the adverse decision. All materials in the agency record submitted to NAD shall be deemed admitted as evidence for the purpose of a hearing or record review. When accepting the agency record, the Hearing Officer will identify the number of pages, describe the documents in the agency record, and confirm that all parties have identical copies. Identification of each page is not required, but it is necessary to identify the documents within the agency record: "Pages 1 through 4 are \_\_\_\_\_, pages 5 through 16 are \_\_\_\_\_, etc."

During the hearing, the parties should refer to documents in the agency record by page number.

Objections other than relevance to the agency record are not permitted. Documents in the agency record usually do not need to be authenticated. Specific documents in the agency record may be challenged as: not properly part of the agency record, fraudulent, or otherwise problematic. Authentication of a document, usually done by affidavit, may cure a challenge.

**b. Relevancy and reliability.** (**7 CFR §11.8(c)(5)(ii)**) Only evidence relevant to the issue(s) under appeal should be considered. Relevant evidence is evidence that tends to make the existence of a fact more or less likely than it would be without the evidence. The Hearing Officer may exclude irrelevant evidence, information or questions. If appropriate, the Hearing Officer should explain the reason(s) for exclusion and place any proffered documentary evidence in the case record.

Any evidence may be received without regard to whether that evidence could be admitted in judicial proceedings.

The reliability and probative value of the evidence will determine the weight it is given by the Hearing Officer.

Generally, the appellant offers evidence first. The Hearing Officer may determine that the agency should present its evidence first, but the burden of proof does not shift to the agency.

**c. Exhibits and documentary evidence.** Parties may submit information in support of their positions. Any relevant document may be submitted and provided to the Hearing Officer and to all other parties. Evidence may include, but is not limited to, bank records, Extension Service publications, scale tickets and bills of lading, employment records including paycheck stubs, independent appraisals, wills, court orders, photographs (which must be clearly marked to indicate the subject matter and date, if relevant), surveys, land plats, and legal documents such as deeds, leases, and liens.

A witness statement may be introduced if the witness is not available for questioning. The Hearing Officer will determine how much weight a statement should be given, considering the absence of the witness, the basis of knowledge, and the inability to cross-examine the witness.

If evidence was not provided before the hearing, a party seeing the information for the first time may want to review it. The Hearing Officer may provide a short recess or, in unusual cases, continue (postpone) the hearing until a later date, depending on the relevance, significance and complexity of the information.

A party may object to evidence or argue that it is unnecessarily prejudicial, irrelevant, cumulative, or not what it appears to be. If the Hearing Officer excludes evidence or admits it in the face of an objection, he/she shall document the reasons in the record and place any excluded evidence at an appropriate place in the case record.

**i. Exhibit standards.** Submissions are placed in the case record and will not be returned. Originals need not be submitted, but the clarity of copies is important. There is no limit on the number of documents or amount of evidence that can be submitted, but the Hearing Officer

may exclude repetitive or irrelevant submissions. Generally, all submissions will be accepted by the Hearing Officer, but some limitations apply.

Audio and video tape recordings will be accepted, but viewing equipment may not be available at the hearing.

Photographic or written evidence will be accepted, although large maps, plat maps, aerial surveys, etc. should be reduced to 8-1/2 x 11-inch pages. Smaller photographs should be mounted on 8-1/2 x 11-inch paper. Maps and similar materials cannot be accepted in tubes. Photographic slides (transparencies) and photographs in electronic (digital) format cannot be accepted, but should be printed no larger than 8-1/2 x 11.

Plant material, soil samples, and similar articles that are perishable, bulky or otherwise not susceptible to long-term storage cannot be accepted. Parties are encouraged to represent such materials in photographs, written expert opinions, or similar documentary evidence. For such evidence, the parties may agree on a description for the record. All information used by the Hearing Officer to reach a decision must be made part of the record; therefore, the Hearing Officer will consider only submissions that meet these criteria and become part of the case record.

**ii. *Authenticating records.*** The Hearing Officer will ascertain that documents are what they purport to be. The Hearing Officer or a party may ask questions about the authenticity of the documents: are they accurate copies, were they prepared when they appear to have been, do they refer to the matter at issue and not to a similar, but different, matter, or are the signatures genuine?

**iii. *Identification of documents.*** A document should to be identified when it is discussed. The Hearing Officer must ensure that everyone, including those participating by telephone and subsequent reviewers, can identify the document being discussed. The material must be described. For example, “Pages 16 through 20 of the agency record are the 1998 appraisal completed by the agency’s contract appraiser” or “Page 14 of appellant’s exhibit A is a letter from the XYZ Company dated July 2, 1998, signed by Harold Burns, vice president for sales.”

**iv. Summary on admitting documents.** Before the Hearing Officer accepts documentary evidence into the hearing record, he/she should determine that it is relevant, authentic, and properly labeled. The Hearing Officer will ensure that all parties are aware of the contents of the document and have an opportunity for review and comment.

**d. Testimony.** Testimony is oral evidence. All live testimony will be under oath. Testimony ordinarily should be limited to facts known to the witnesses.

Parties may testify as witnesses. After testimony is given, each party will have an opportunity to question all witnesses as specified in **7 CFR §11.8(c)(5)(ii)**. A witness list is submitted before the hearing, but the Hearing Officer may accept testimony from a witness who was not on the list.

The Hearing Officer may question witnesses after their testimony has been presented to obtain information and clarify for the record any items that are unclear, confusing or conclusory. The Hearing Officer must be impartial and objective, not adversarial.

Parties should avoid compound questions (those with more than one part) that may confuse witnesses and subsequent reviewers. Parties may object to compound questions. The Hearing Officer may request the questioner to rephrase the question or assist the party in forming questions, if needed.

A party may present an expert as a witness. Experts are qualified to speak authoritatively by reason of their special training, skill or familiarity with a particular issue (usually scientific, technical or professional). Such witnesses are given more latitude to testify about their opinions than other witnesses are. The Hearing Officer or the opposing party may ask questions to determine the expert's expertise on the subject of his/her testimony.

The Hearing Officer may sequester a witness (excuse the witness from the hearing room during the testimony of others) when he/she believes it is appropriate. Sequestered witnesses are permitted to remain in the hearing room after testifying. Parties may always remain in the hearing room, even if they will be testifying.

The Fifth Amendment privilege not to incriminate oneself protects an individual from having to say things that would make him/her criminally liable. The privilege is limited. If there is no potential

criminal liability in any forum, a witness cannot refuse to testify. A witness who has been granted immunity from prosecution or already prosecuted criminally may not claim the Fifth Amendment to avoid testifying.

The Fifth Amendment privilege does not extend to a corporation or other entity. If a business or other entity is an appellant, a witness may not assert the privilege on behalf of the entity. The privilege cannot be asserted to protect documents from disclosure.

**e. *Going off the record.*** Generally, everything that occurs during the hearing is recorded. But it may be necessary to go off the record if equipment malfunctions or the situation is so confused that the record will be easier to follow if the confusion is alleviated before the hearing proceeds. If a party asks to go off the record, the Hearing Officer shall decide whether to grant the request.

The merits of the appeal should not be discussed while off the record. If such a discussion occurs, the Hearing Officer shall summarize the discussion for the record and ask the parties to confirm that the summary is accurate. If no such discussions took place, the Hearing Officer will say so and ask the parties for confirmation when taping resumes. The time the proceeding went off the record and when taping resumes should be noted on the tape.

**f. *Unrepresented parties.*** Identifying all evidence necessary to make a determination may be difficult when an appellant has no representative (a *pro se* appellant). The Hearing Officer may have to be more active in questioning the parties to obtain all needed information, but shall avoid becoming an advocate for a party.

**g. *Rebuttal.*** Each party has an opportunity to rebut the other's case. Rebuttal involves presenting evidence or arguments to disprove or discredit an argument. The Hearing Officer shall determine when sufficient opportunity for rebuttal has occurred, while ensuring each party a full opportunity to present evidence and arguments.

**h. *Hearing Officer questions.*** The Hearing Officer may ask questions to clarify points. Questioning should be neutral and objective. Hearing Officers generally should avoid asking questions until after the parties have presented a witness' testimony and had an opportunity for cross-examination.

**12. *Summations and ending the hearing.*** Each party may make a closing statement in support of his/her position. The closing statement should not ordinarily be interrupted. No examination of a party should be permitted following a closing statement. The Hearing Officer will verify that the parties have submitted all the information they wish and any the Hearing Officer has requested. Closing briefs are not required unless the case involves complex or unique circumstances. If briefs or other documents are to be submitted after the hearing, the Hearing Officer shall keep the record open for a reasonable time to receive them (**see Briefs, Section 3 I. E**).

The Hearing Officer shall close the proceedings, establish deadlines for any further submissions, note the date the hearing record will close, and explain when a determination will be issued.

The Hearing Officer will not indicate what decision will be issued or discuss the persuasiveness of any evidence or testimony.

**13. *Recessing the hearing.*** The Hearing Officer may need to recess the hearing for a short break, during which time the tape recorder is turned off. A recess may:

- allow the Hearing Officer and/or the parties to review new evidence;
- allow the parties to correctly label and number the agency record or exhibits;
- provide time for meals or personal needs;
- give the participants a chance to cool off when emotions flare;
- and allow the Hearing Officer to consult with NAD officials.

**14. *Continuing the hearing.*** Occasionally, a hearing may need to be continued (stopped for a period of days or weeks) and reconvened later. A continuance may be necessary, for example, when:

- 14-day notice of a hearing must be given to a third party whose identity became known at the hearing;
- parties, witnesses, or the Hearing Officer have scheduling difficulties that cannot be overcome; or

- at the end of the day, it appears that the hearing requires additional time and it is not possible to resume on the following day.

When the hearing is continued, the Hearing Officer shall explain clearly for the record the reasons for the continuance. The parties will be notified when the hearing will be reconvened.

**15. *Reconvening the hearing.*** A hearing that began as an in-person hearing may be reconvened as a telephone hearing. When reconvening a hearing, the Hearing Officer will:

- make a brief opening statement stating the date, time, attendees, and extent of the reconvened hearing;
- advise persons already sworn in that they remain under oath; and
- explain that the previous rulings are still in effect.

**16. *Adjourning the hearing and closing the record.*** (7 CFR §11.8(c)(7))

The Hearing Officer shall adjourn the completed hearing. If a party wishes to submit additional information, the Hearing Officer shall determine if it is relevant and necessary to the determination. Evidence that was unavailable at the hearing, such as a party's response to a new issue or to evidence presented during the hearing, may be submitted after the hearing.

Generally, the record may be kept open for no more than 10 days; however, the Hearing Officer may determine that a longer period is required. Extensions of more than 20 days are discouraged. The Hearing Officer will add to the hearing record any new information provided after the hearing and may allow the other part(ies) to respond to it.

If no additional information will be submitted, the record will be closed at the end of the hearing.

**C. Telephone hearings.** The hearing may be held by telephone at the request of the appellant as specified in 7 CFR §11.8(c)(5)(i). The hearing process is the same as for an in-person hearing. The hearing format (see **Appendix 3**) shall be used. The Hearing Officer shall ensure that everyone is looking at the same documents at the same time and understands what is being said. In a telephone hearing, it is particularly important that documents are properly labeled and exchanged in advance. New documentary evidence may be exchanged during a telephone hearing if facsimile machines are available to all parties.

Although the parties should identify everyone present during a telephone hearing, there is no way to ascertain who else may be monitoring the hearing. In order to



ensure that the recording of the hearing is audible and understandable, parties and witnesses should identify themselves when they speak. The Hearing Officer is responsible for ensuring that the identity of speakers is clear.

**D. Record review. (7 CFR §11.1)** An appellant may request a record review instead of a hearing at any time before the hearing. In a record review, the Hearing Officer examines the agency record and other information and arguments submitted by the parties and issues a determination.

Parties may submit information, including affidavits and declarations, by a date set by the Hearing Officer. All information shall be provided to the other party and the parties may comment on each other's submissions. Any testimony should be in an affidavit or a statement sworn to under penalty of perjury. The Hearing Officer may ask for clarification or additional information.

In most cases, the Hearing Officer has 45 days from the receipt of a request for a record review to issue a determination as specified in **7 CFR §11.8(f)** (see **Failure to appear, below**).

**E. Failure to appear. (7 CFR §11.8(c)(6))** If an expected party and/or representative does not appear at a scheduled prehearing or hearing, the Hearing Officer should wait a reasonable period of time (generally not less than 30 minutes for in-person hearings). If the parties are responsible for joining a telephone conference call, the Hearing Officer should attempt to contact the missing party(ies). The Hearing Officer should document on the record the failure to appear and the amount of time he/she waited.

If a party fails to appear for a hearing, the Hearing Officer may cancel the hearing, pending a determination whether the party can show good cause for the failure to appear. The Hearing Officer should notify the absent party that he/she has a period of time (generally 10 days) to document why he/she did not appear. If the party shows good cause, the hearing will be rescheduled.

The Hearing Officer will determine whether the reason(s) offered for failure to appear constitutes good cause. The Hearing Officer will carefully consider the reasons(s), but merely forgetting the hearing (absent extenuating circumstances such as a documented medical condition) or choosing not to attend may result in a finding of no good cause.

If a party cannot show good cause for the failure to appear at a hearing, the Hearing Officer will consider which of the following options is the most appropriate:

- treat the case as a record review and issue a determination based on the agency record and the hearing record developed prior to the hearing date;

- cancel the hearing and accept evidence submitted by any party present at the hearing, provide a copy of the evidence to the absent party or parties, and allow 10 days for a response, and issue a determination; or
- dismiss the appeal (which dismissal may be appealed to the Director).

If a hearing is rescheduled because of a party's failure to appear at the original hearing, and the same party fails to appear at the rescheduled hearing, the Hearing Officer is authorized to dismiss the appeal unless good cause involving extraordinary circumstances are shown for the repeated failure to appear.

**F. False testimony.** A determination is based on evidence the Hearing Officer deems relevant, reliable and credible. If the Hearing Officer considers evidence to be false, he/she should give the testimony no weight in reaching a determination. The Hearing Officer's reasons for suspecting false testimony under oath should be documented in the record and reported to the Regional Assistant Director.

**G. Conduct.**

**1. *Disruptive conduct.*** If the behavior of a party effectively impedes the progress of the hearing, the Hearing Officer should point out his/her responsibility to conduct the hearing and explain that he/she expects cooperation from both parties. In extreme cases, after due warning, if the party persists in using obstructive tactics, the Hearing Officer may eject the offender, or suspend, or even terminate the hearing. If he/she does suspend a hearing, he/she should inform the parties of the circumstances and the time under which the hearing may be continued. If the Hearing Officer terminates the hearing, he/she should set a reasonable time during which the record will be kept open for submission of arguments or evidence. The Hearing Officer may not disturb the relationship between the respondent and his/her representative by dismissal of the latter from the hearing. However, termination of a hearing may be necessary if the party persists in obstructive conduct when the hearing is reconvened.

A Hearing Officer must document the record before taking the above action. Usually, the first time a party disrupts the proceedings, the Hearing Officer reminds the party of his/her responsibility to maintain order and warns the party not to continue this conduct. The second time, the Hearing Officer advises the party he/she has been warned once about engaging in this conduct and, that if the disruption occurs a third time, the Hearing Officer will ask the party to leave, suspend the hearing, or terminate it. The party is advised that if the hearing terminates, the Hearing Officer will adjudicate the case on the record based upon testimony and documentary evidence presented during the hearing or by prior stipulation.

**2. *Severe misconduct.*** Severe misconduct contemplates such actions as threats or assaults. Anyone who engages in such misconduct may be excluded from the hearing. Local law enforcement authorities should be called if physical confrontation has occurred or if the Hearing Officer believes that the misconduct represents an immediate threat. The Hearing Officer should report the incident to his/her supervisor and should note the event and the action taken in the record (see **Security, Section 3. VI. A**).

**H. Withdrawals.** The right to request an appeal belongs to an appellant. Once a request for appeal is accepted, only an appellant may withdraw it.

**1. *Agency withdrawal of adverse decision.*** The agency may withdraw its adverse decision at any time, even during the hearing. If the appellant does not withdraw the appeal, the Hearing Officer will determine if the entire adverse decision which is the subject of the appeal was withdrawn. If there is no adverse decision outstanding, the appeal may be dismissed.

**2. *Withdrawal of appeal.*** An appellant may withdraw an appeal at any time for any reason. No explanation is required. Withdrawals should be in writing, but in the absence of a written withdrawal, the Hearing Officer may note the withdrawal in the record. A withdrawal ends the appeal of that appellant and concludes all appeal rights relating to the adverse decision if the time to request an appeal has expired. A withdrawn appeal cannot be reinstated if more than 30 days have elapsed since the appellant received the adverse decision.

**3. *Withdrawals in cases with more than one appellant.*** If there is more than one appellant in an appeal, a withdrawal by one appellant does not end the appeal as to other appellant(s). The withdrawing appellant is no longer party to the appeal, but the appeal continues with the remaining appellant(s).

**4. *Withdrawals in cases with a third party.*** A third party does not have the right to continue with a hearing when the appellant(s) have withdrawn. If any appellant remains after one or more withdraw, the appeal continues and the third party may continue to participate (see **Third Parties, Section 3. III. A. 6. a.**).

**I. Reopening the hearing.** Occasionally, after adjourning the hearing and closing the record, circumstances, such as the receipt of new, relevant information from a party, require the Hearing Officer to reopen the hearing. Also, the Director may remand all or part of a determination to a Hearing Officer for further proceedings to complete the hearing record or hold a new hearing, as specified in **7 CFR §11.9(d)(1)**.

**1. *Receipt of unsolicited information after the hearing.*** If unsolicited information is submitted after the hearing record is closed, but before issuance of the determination, the Hearing Officer will determine whether it is relevant, material, and not duplicative. A Hearing Officer should assure himself or herself that a copy has been served on all other parties in the matter. If the new evidence is found to be relevant and material, the hearing record may be reopened to allow the other party(ies) to address the new information. If the Hearing Officer finds the new information to be irrelevant, immaterial or duplicative, he/she will notify the parties of the disposition of the information by:

- explaining why it is irrelevant or immaterial and not considered; the material is placed at the appropriate tab in the case record;
- explaining why it is duplicative and not accepted into the case record; the material is returned to the sender.

The appeal determination should note that additional information was submitted after the record was closed but was deemed to be irrelevant, immaterial, or duplicative, and was not considered in the determination.

**2. *Remanded cases. (7 CFR §11.9(d)(1))*** The Director may remand a case if the hearing record is inadequate or if new evidence has been submitted. All or a portion of a determination may be remanded for further proceedings to complete the hearing record or, at the option of the Director, to hold a new hearing. In a remand, the Director review determination serves as a remand order and describes the scope of the remand.

The remand may be to the original Hearing Officer or may be assigned to a new Hearing Officer. It may require rehearing all or a portion of the case. If a new hearing is held, a new hearing record is prepared. If the case is not reheard, the existing hearing record is completed, as appropriate.

**3. *Remand proceedings.*** The remand order may require a new hearing. All provisions relating to original hearings apply to remand hearings. If a new hearing is ordered, but the appellant does not desire a hearing, the Hearing Officer shall document the appellant's wishes in the case record and proceed with a record review. Otherwise, the Hearing Officer shall conduct further proceedings consistent with the remand order.

**4. *Remand determinations.*** Regardless of the type of remand proceeding, a new determination, identical in form to an appeal determination, is issued by the Hearing Officer at the completion of the remand. All issues raised in the remand order shall be addressed in the determination.

**5. Time frames.** In some cases, the remand order will prescribe deadlines for action by the Hearing Officer. In the absence of specific direction, a remand determination shall be issued within 60 days of receipt of the remand order in the regional office if a new hearing is held. If no hearing is held, the Hearing Officer has 30 days from the date of receipt of the remand order in the regional office to issue the new determination. Written extension requests may be granted for good cause and are documented in the case record.

## **VII. THE APPEAL DETERMINATION**

**A. Format.** The appeal determination states whether or not the adverse decision is erroneous. It specifies the findings of fact and conclusions based on those findings as they relate to applicable laws and regulations.

Regulations need not be quoted at length. An accurate citation to the specific language of applicable regulations is sufficient. For regulations or administrative notices, the year of the source cited should be included, i.e., 7 CFR §1951.204 (1997), or 7 CFR §1951.204, 69 FR 22, 114 (Feb. 23, 2000), or DN-104 (January 1, 2000).

Citations to court decisions generally are not appropriate in appeal determinations. If a legal citation is required because it is controlling in the matter, its inclusion should be discussed with the Hearing Officer's supervisor.

Footnotes are not appropriate in appeal determinations. All discussion and authorities should be included in the body of the determination.

A copy of the appeal determination is provided to all appellants, their authorized representatives, other parties, and the agency, as specified in **7 CFR §11.8(f)**.

### **B. General. (7 CFR §11.10)**

**1. Rules of Procedure.** Regulations at 7 CFR Part 11 apply to appeals and the preamble to this part provides guidance on how the regulations are generally interpreted.

An appeal determination is based on:

- the case record;
- laws applicable to the matter at issue;
- applicable regulations published in the Federal Register and in effect on the date the agency issued its adverse decision or the date on which the acts that gave rise to the adverse decision occurred,

whichever is appropriate under the applicable agency program, as specified in **7 CFR §11.10(c)**; and

- generally applicable interpretations of regulations and laws, which may include: (1) court decisions interpreting a particular program provision; (2) the interpretation of a law or regulation by the USDA Office of the General Counsel; or (3) a handbook or other official document interpreting an agency's regulations.

**2. Agency laws.** The Hearing Officer will consider relevant laws, regulations, and generally applicable interpretations of the laws and regulations. Agency Guides that are consistent with its laws and regulations may be considered. The Hearing Officer is not bound by handbooks and other agency materials if they are inconsistent with the agency's laws and regulations.

Appeals may not challenge regulations (**see Jurisdiction, Section 3. I. A.**).

**3. Federal Rules of Evidence.** The Federal Rules of Evidence, a formal set of rules for the introduction of evidence in Federal courts, do not apply to hearings, as specified in **7 CFR §11.4(b)**. Evidence that is otherwise inadmissible in another forum may be considered, as specified in **7 CFR §11.8(c)(5)(ii)**. The Hearing Officer has discretion in determining what evidence to consider. Hearsay evidence may be considered, for example, if it is relevant and reliable (**see Director Review, Section 4**).

**C. Timing of appeal determination. (7 CFR §11.8(f))** Unless an extension is granted, an appeal determination will be issued within 30 days after the hearing record is closed. A record review determination requested by the appellant will be issued within 45 days of receipt a record review request. A record review determination done because a party failed to appear for a hearing (**see Section 3. V. E.**) will be issued within 30 days from the date the record is closed.

The Hearing Officer may request, in writing, an extension of time for issuing a determination and must specify the reason(s) and the time desired. The Regional Assistant Director may authorize, in writing, an extension up to 30 days. Longer extensions may be granted by the Director.

**D. Contents of appeal determination.** The appeal determination should be written in a format prescribed by the Director. A well-written determination should clearly set forth the following items, as appropriate, and should be written so that it is understandable to the parties:

- a clear statement of the issues under appeal/matters in dispute;
- a summary of the adverse decision;

- the NAD appeal case number;
- the names and identification of parties;
- the name of the Hearing Officer;
- the date of the determination;
- the date of the appeal hearing;
- the place of the in-person hearing;
- the date of the adverse decision under appeal;
- the identity of the agency entity that issued the adverse decision;
- a clear statement of controlling laws, regulations or other authorities;
- a note whether the appeal was timely filed;
- a clear statement of appellant's position;
- findings of fact;
- the Hearing Officer's conclusions in resolving the issues on appeal;
- the determination of whether agency erred;
- a statement of the parties' right to review and time limit for filing a review request; and,
- if raised by a party during the appeal, a statement of the rights pertaining to allegations of discrimination, misconduct, waste, fraud, or abuse.

**1. *Findings of fact and conclusions.*** Findings of fact and conclusions constitute the essentials of the appeal determination. If an appeal involves multiple issues, each should be clearly described and resolved with pertinent findings of fact and conclusions. The appeal determination follows a logical sequence: findings, analysis and conclusions for each issue.

**a. *Findings of fact.*** The Hearing Officer makes findings of fact in a case based on the evidence, but are not mere recitations of the evidence. The Hearing Officer is an independent fact finder and is not bound by the agency's findings, as specified in **7 CFR §11.10(a)**.

Findings of fact are limited to issues on appeal. For example, if the appellant offered evidence that it rained, and the agency offered evidence that it did not rain, the Hearing Officer should find as a fact whether it rained, if that fact is essential to the determination. The Hearing Officer should cite the evidence that supports the finding of fact.

If a document is relevant to the conclusions, the Hearing Officer may need to find not only that the document exists, but that it establishes certain facts.

The determination should explain why any relevant evidence was not considered. For example, if evidence was submitted by a party after the record closed, and the Hearing Officer did not rely on it in any way, the Hearing Officer should make a statement to that effect in the determination.

Credibility of witnesses and evidence is a matter within the province of the Hearing Officer. That is, whether evidence is plausible and worthy of belief is to be evaluated in determining the facts.

**b. *Analysis.*** An analysis section may be useful in many cases. It should not repeat the findings of fact or conclusions. Witness credibility, based on specific conduct or observations, may be discussed. Skillful use of the analysis section can clarify the Hearing Officer's thought process and make the reasoning that supports the determination apparent to parties and others examining the decision.

**c. *Conclusions.*** Conclusions are the legal consequences, under an agency's laws and regulations, of the facts found by the Hearing Officer. Conclusions do not merely recite the findings of fact, but should be supported by the facts. In the conclusion section, the Hearing Officer applies the applicable regulations to the facts and draws conclusions concerning whether the agency acted erroneously in law or fact in its adverse decision. Conclusions should address all significant arguments by the party that did not prevail in the case.

## **2. *Appeal determination.***

**a. *General.*** The appeal determination is limited to whether the agency erred or did not err in the adverse decision. The Hearing Officer has no authority to review the legality of statutes or regulations, or to order any action by the agency (**see Jurisdiction, Section 3. I. A.**). For example, if the Hearing Officer determines that a real estate appraisal was not performed in a manner consistent with applicable regulations, the errors in the appraisal will be noted, but the determination will not direct the agency on how a new appraisal is to be performed.

**b. *Cases involving several reasons for an adverse decision.*** In some cases, the adverse decision may list several reasons for the decision; for example, it may be noted that a program applicant failed to meet several eligibility criteria. In such a case, a



conclusion by a Hearing Officer that the agency erred as to one of the criteria does not itself establish error in the adverse decision.

**c. *Cases involving a single eligibility factor.*** In some cases, the adverse decision may relate to only one eligibility factor. A determination that the agency erred as to one element of a qualification process does not excuse the appellant from having to satisfy all other elements for program eligibility.

**3. *Right to review.*** The appeal determination shall include a clear statement of the parties' review rights and the next available steps (**see Appendix 3**).

**E. Equitable Relief. (7 CFR §11.9(e))** In some cases, agencies are authorized to grant equitable relief to program participants. The Director has the authority to grant equitable relief in the same manner and to the same extent as such authority is provided an agency under applicable laws and regulations, as specified in 7 CFR §11.9(e). A Hearing Officer does not have the authority to grant equitable relief.

Equitable relief may arise in two ways. First, an appellant may appeal an agency's denial of equitable relief. In such cases, the Hearing Officer will make findings of fact and draw conclusions as to whether the agency erred in denying the relief. A determination that the agency erred in denying the relief is not itself a grant of relief by the Hearing Officer. Second, an appellant may raise a claim for equitable relief in the appeal. The Hearing Officer will take evidence and make factual findings on the issue so the Director will have a record on which to determine whether to grant equitable relief, but the Hearing Officer cannot grant equitable relief. The Hearing Officer shall not include in his or her determination a recommendation that the Director grant equitable relief. Determinations in cases in which equitable relief is raised during the appeal process should include the language provided at **Appendix 3**.

**F. Finality.** An appeal determination is a final administrative action on the issue, unless a Director review (**see Section 4**) is requested within the time allowed, as specified in 7 CFR §11.8(f).

## **VIII. THE CASE RECORD**

The case record includes all documents, evidence, and other materials generated in the appeal. It includes the agency record, the hearing record (including the transcript or tape recording of the hearing), and post-hearing submissions.

**A. Contents of case record.** The case record includes:

- a list of those participating in the hearing;
- the adverse decision being appealed;
- all correspondence between NAD and the parties;

- the appeal determination;
- the agency record;
- the agency exhibits;
- the appellant exhibits;
- tape recordings for all prehearing conferences and hearings; and
- written transcripts, if any.

**B. Creation and use of case record.** The Hearing Officer develops the case record (see **Appendix 5**). It constitutes the official record of the appeal and contains all evidence and other materials relied on in the determination. It serves as the basis for any review of the determination. It is essential that the case record contain all the information supporting the determination. The NAD External Affairs Officer prepares all official records for submission to a court.

**C. Availability of case record.** A copy of the case record is available to any party to the appeal.

**D. Deficient hearing tapes.** The tape recording of the hearing is the official record of the appeal. If the recording is deficient, action to be taken depends on the point at which the damaged or blank tape was discovered. In all cases of damaged tapes, a memorandum documenting the circumstances of the damage will be provided to the parties and filed in the case file.

If the tape is damaged or found to be blank before the hearing concludes, the Hearing Officer and the parties will recreate the missing portion of the record.

If the tape is damaged or found to be blank after the hearing is concluded, but before the determination is issued, the Hearing Officer will notify the parties of the scope of the damage and provide an opportunity for the parties to submit information to complete the record.

If the tape is damaged or the damage is discovered after a determination is issued, NAD will notify the parties of the scope of the damage, provide them a copy of any tapes on which any information exists, and notify the parties that the adequacy of the record will be considered on review, if one is requested.

## **IX. OTHER ISSUES**

**A. Settlement.** The Hearing Officer may not be involved in settlement discussions. The hearing may be recessed for such discussions if requested. If a case is settled, the appeal may be withdrawn or dismissed (see **Withdrawals, Section 3 V. H.**).

**B. Allegations of discrimination.** NAD has no jurisdiction to address allegations of discrimination, as specified in **7 CFR §§11.1 and 11.3**. If an

appellant alleges discrimination, the Hearing Officer should explain that the issue can be pursued through the USDA Office of Civil Rights (see **Appendix 1 and Section 3 I. D.**).

**C. Allegations of misconduct or waste, fraud or abuse.** NAD has no jurisdiction to address allegations of misconduct, waste, fraud or abuse, as specified in **7 CFR §11.3**. If an appellant alleges such activity, the Hearing Officer should explain that the issue can be pursued by filing a complaint with the offending employee's supervisor or with USDA's Office of Inspector General.

**D. Congressional contacts.** Congressional contacts, like all communication with parties and representatives, are subject to ex parte rules; the substance of the case may not be discussed without notice to the other party. Congressional inquiries about appeals in Director reviews are answered by the NAD External Affairs Officer. Congressional inquiries about all other appeals are answered by the Regional Assistant Director. Verbal communications with Congressional offices will be summarized in a memorandum that is placed in the case record and provided to the External Affairs Officer.

## SECTION 4 - DIRECTOR REVIEW

### I. REQUESTS FOR DIRECTOR REVIEW

#### A. Parties.

1. ***Appellants.*** (7 CFR §11.9(a)) An appellant may request a Director review, specifying the reasons the appeal determination is wrong.
2. ***Third Parties.*** (7 CFR §11.15) A third party may request a Director review.
3. ***Agency.*** (7 CFR §11.9(a)) The head of an agency that has received an appeal determination that finds that the agency erred in the adverse decision, in whole or in part, may request a Director review, specifying the reasons the appeal determination is wrong, including violations of laws and regulations.
4. ***Interested Parties.*** (7 CFR §11.15) An interested party may not request a Director review.

#### B. Timeliness. (7 CFR §11.9(a)) A request for Director review from an appellant or third party must be submitted no later than 30 calendar days after receipt of the appeal determination.

A request for Director review from the head of an agency may be submitted no later than 15 business days after receipt of the appeal determination.

#### C. Requirements for the Request for Review.

1. ***Personal Signature.*** (7 CFR §11.9(a)(1) and (2)) A request for review must be signed personally by the appellant, third party, or the head of the agency requesting review. Requests for review filed by corporations or other entities must be personally signed by an duly authorized officer of the corporation.
2. ***Service.*** (7 CFR §11.9(a)(3)) The party requesting the review shall simultaneously submit a copy of the request for review and any new information to all other parties to the appeal. If it is not clear that the submitting party has copied the other parties, that party will be given 5 days to verify that a copy of the material was submitted to the other parties to the appeal.

**3. *Representation.*** Appellants may be represented during a Director review, but requests for Director review must be personally signed by the appellant or a third party. A properly executed Authorization of Representation must be on file. Representatives may be lawyers, friends, family members, farm managers, accountants, advocacy groups, or other individuals or entities of the appellant's choosing. When an appellant or third party is represented, NAD will send copies of all notices and correspondence to all parties.

**4. *Responses to requests for review.* (7 CFR §11.9(c))** All parties to the appeal have an opportunity to submit a written response to the request for Director review within 5 business days of receipt of a copy of the request for review. Timely filed responses will be considered during the Director review.

## **II. CONDUCT OF THE DIRECTOR REVIEW**

**A. Limitations.** Director reviews consider the appeal determination, the agency record, the case record, the request for review, information and arguments submitted with the request for review, any responses to the request for review, and other information that may be accepted by the Director, as specified in **7 CFR §11.9(d)**.

No ex parte communication is permitted, and no form of hearing is authorized.

**B. Standard of Review. (7 CFR §§11.9(d) and 11.10)** The standard of review is whether substantial evidence supports the findings of fact made in the Hearing Officer's appeal determination. While findings of fact will not be disturbed unless contradicted by the record, no such deference is given to the conclusions and determination.

## **III. THE REVIEW DETERMINATION**

**A. Outline.** The review determination should contain, as appropriate:

- a summary of the adverse decision;
- the NAD case number;
- the names and identification of all parties;
- the name of agency that issued the adverse decision;
- a summary of the evidence;
- additional facts supported by the record;
- a determination of whether the appeal determination is supported by substantial evidence;

- a statement that the Director review is the final administrative action on the issue; and
- if raised during the appeal or the Director review, a statement of the right to pursue allegations of discrimination, misconduct, waste, fraud or abuse.

**B. Contents.** The Director review determination will contain findings of fact and conclusions.

**1. *Findings of Fact.*** The Director review will examine the facts found by the Hearing Officer in the appeal determination and determine if they are supported by substantial evidence. The review determination will make any additional factual findings necessary to decide the matter.

**2. *Determination.*** The review determination may uphold, reverse, modify or vacate the appeal determination or remand all or a portion of the determination for further proceedings, as specified in **7 CFR §11.9(d)**.

Remands may require that the Hearing Officer address certain new evidence or otherwise address an inadequate record. It may also specify further proceedings or a new hearing is required before another Hearing Officer.

An appeal determination may be vacated on Director review if it is determined that NAD should not have considered the appeal (see **Jurisdiction Section 3 I. A.**).

**C. Finality.** A Director review determination, other than a remand, is the final administrative action on an issue, as specified in **7 CFR §11.9(d)**. It is reviewable in any U.S. District Court of competent jurisdiction, as specified in **7 U. S. C. §6999 and 7 CFR §11.9(d)**.

**D. Timing. (7 CFR §11.9(d)(2))** For Director reviews requested by an agency, the Director review determination ordinarily will be issued within 10 business days of receipt of a request for Director review. For Director reviews requested by an appellant or third party, the Director review determination ordinarily will be issued within 30 business days of receipt of a request for Director review.

#### **IV. EQUITABLE RELIEF**

**A. Authority.** The Director has authority to grant equitable relief in the same manner and to the same extent as such authority is provided an agency under applicable laws and regulations, as specified in **7 U. S. C. §6998(d)** and **7 CFR §11.9(e)** (see **Equitable Relief, Section 3, V. F.**).

**B.     Consideration.** Requests for equitable relief may be considered during a Director review even if equitable relief was not requested during the hearing. Cases may be remanded to a Hearing Officer to develop the facts relevant to a request for equitable relief.

## SECTION 5 - RECONSIDERATION

### I. GENERAL (7 CFR §11.11)

The Director has inherent authority to reconsider any aspect of a final Director review determination.

As the preamble to the NAD procedural rules states: [the NAD rules] reflect the inherent authority of a decision-maker under general principles of law to review his or her decisions to correct errors. These errors (such as citation of the wrong dates, wrong amounts, wrong regulations, or wrong statutes), not changes in interpretations or opinions, and, as such, should be quickly detectable upon reading the determination and reviewing the record.

### II. REQUEST FOR RECONSIDERATION

A party may request reconsideration of a Director review determination if the party specifies that the determination contains on its face a material error of fact or a detailed explanation of how it is contrary to statute or regulation which would justify reversal or modification of the determination.

**A. Filing a request for reconsideration.** Reconsideration may be requested by the appellant or the agency within 10 days of receipt of a Director review determination. A request for reconsideration should contain a detailed statement of a material error of fact made in the determination, or a detailed explanation of how the determination is contrary to statute or regulation, which would justify reversal or modification of the determination.

**B. Notice to parties and opportunity to comment.** NAD will notify the parties of whether the request for reconsideration meets the criteria and, if the criteria are met, will provide a copy of the request for reconsideration to the other parties, who may file a response to the request. Responses must be filed with the Director within 5 days of receipt of notice from the Director.

### III. RECONSIDERATION DETERMINATION

**A. Finality of a reconsideration determination.** A reconsideration decision becomes the final determination of the Director.

**B. Timing.** A reconsideration determination will be issued within 5 days of receipt of responses, if any, from the non-requesting parties, as specified in 7 CFR §11.11(c).



## SECTION 6 - FINAL DETERMINATION

### I. WHEN THE DETERMINATION IS FINAL

**A. Finality of appeal determinations.** A Hearing Officer's appeal determination is administratively final unless a party - an appellant, the agency, or a third party (but not an interested party) - files a request for Director review on a timely basis. If a timely Director review is requested, the appeal determination is not final and the subsequent Director review determination should be examined for finality (**see next paragraph**). If no Director review is requested, the appeal determination becomes final 30 days after it is received by the appellant. An appellant has 30 calendar days from receipt of the determination within which to request a Director review; an agency has 15 business days to make such a request (**see 7 CFR §§11.8(f) and 11.9(a)**).

**B. Finality of Director review determinations.** A Director review determination that remands a case to a Hearing Officer is not final since subsequent action will be taken in the matter. A Director review determination that upholds, reverses or modifies an appeal determination is final when issued, as specified in **7 CFR §11.9(d)**.

**C. Finality of reconsideration determinations.** A reconsideration determination that reverses or modifies a Director review determination is final when issued, as specified in **7 CFR §11.11(c)**.

### II. IMPLEMENTATION

**A. Timing.** When a final determination finds that an agency erred in the adverse decision, the head of the agency shall implement the determination within 30 days of receiving notice of the final determination, as specified in **7 U. S. C. §7000 and 7 CFR §11.12**.

**B. Enforcement.** NAD has no authority to enforce implementation of its determinations. Final determinations are enforceable by a participant in any U. S. District Court of competent jurisdiction, as specified in **7 U. S. C. §6999 and 7 CFR §11.13(a)**.

## SECTION 7 - EQUAL ACCESS TO JUSTICE ACT

### I. GENERAL

**A. Purpose.** The Equal Access to Justice Act (EAJA), Pub. L. No. 96-481, provides attorney fees and other expenses to eligible parties who prevail unless the position of USDA was substantially justified or special circumstances make an award unjust, as specified in **7 CFR §1.181**.

**B. Jurisdiction.** EAJA applies to NAD proceedings arising within the jurisdiction of the Eighth Circuit Court of Appeals only. Lane v. USDA, 120 F. 3d 106 (8th Cir. 1997).

EAJA applications from states outside the jurisdiction of the Eighth Circuit Court of Appeals are forwarded to the Director for reply.

**C. Procedure.** A NAD adjudicative officer appointed by the Director will issue an initial determination on an application for EAJA fees and expenses. Either party may request that a USDA Judicial Officer review the initial determination and issue a final administrative determination pursuant to **7 CFR Part 1, Subpart J**.

**D. Definitions.** Definitions in EAJA regulations differ somewhat from those in the regulations that apply to NAD appeals. An *adjudicative officer* means an administrative law judge, administrative judge, or other person assigned to conduct a proceeding covered by EAJA. Within NAD, the Hearing Officers and the Director are adjudication officers (see **7 CFR §1.180(a)**).

In an EAJA proceeding, the agency's representative is the *agency counsel*, an attorney from the USDA Office of the General Counsel, as specified in **7 CFR §1.180(d)**.

EAJA applications are filed by a *prevailing party*, an individual or entity that prevailed in a NAD appeal or in a significant and discrete substantive portion of an appeal. This may be the party that requested the appeal or any third party. Interested parties (see **Section 3, II. 6.**) do not have standing to file an EAJA application.

Whether the position of the agency was *substantially justified* in the underlying adverse decision shall be determined based on the appeal case record as a whole.

**E. Extensions and Suspensions. (7 CFR §1.195)**

**1. *Settlement negotiations.*** The time within which an agency must file an answer to a prevailing party's application for an EAJA award may be extended for 30 days if agency counsel and the applicant jointly file a

statement of intent to negotiate a settlement. The adjudicative officer may grant additional extensions, as warranted, after consultation with the regional office, as specified in **7 CFR §1.195(b)**.

**2. *Review or Reconsideration.*** If review or reconsideration of the underlying appeal or review determination is requested, EAJA proceedings will be stayed pending final disposition of the appeal.

**3. *Government Appeal.*** If the government appeals the underlying dispute to a court, the EAJA proceeding will be stayed until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined.

**F. Burden of proof. (7 CFR §1.185)** The agency has the burden of proving that its decision in the underlying dispute was substantially justified.

**G. Settlement. (7 CFR §1.198)** At any time before final action on the application for an EAJA award, the applicant and agency counsel may agree on a proposed settlement of the award. If the parties agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement.

## **II. APPLICATION FOR AWARD OF FEES AND/OR EXPENSES UNDER EAJA**

### **A. Who may apply for an EAJA award. (7 CFR §1.184)**

**1. *Prevailing party.*** The applicant must be a “prevailing party” who was successful, in whole or in part, in the appeal for which fees and/or expenses are requested. If NAD found the agency’s decision to be erroneous in whole or in part in a final determination, the applicant has prevailed as to that part of the determination.

**2. *Net Worth Test. (7 CFR §1.184).*** Applicants may not exceed certain limits on net worth and, for businesses, on numbers of employees. Net worth and number of employees are calculated as of the date the proceeding was initiated. Eligible applicants include:

- an individual with a net worth of not more than \$2 million;
- the sole owner of an unincorporated business who has a net worth of not more than \$7 million, including both personal and business interests, and not more than 500 employees (An applicant who owns an unincorporated business will be considered an “individual” rather than a “sole owner of an unincorporated business” if the issues on which the applicant prevails relate primarily to personal interests rather than to business interests);

- a charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. §501(c)(3)) with not more than 500 employees;
- a cooperative association as defined in 15(a) of the Agricultural Marketing Act (12 U.S.C. §1141j(a)) with not more than 500 employees; and
- any other partnership, corporation, association, unit of local government, or organization with a net worth of not more than \$7 million and not more than 500 employees.

**3. *Participants on behalf of another.* (7 CFR §1.184(g)).** An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

**B. Content of Applications. (7 CFR §1.190)**

**1. *Requirements.* (7 CFR §§1.190, 1.192)** An application for an award of fees and expenses under EAJA shall:

- identify the applicant and the NAD case number for which an award is sought;
- show that the applicant prevailed in whole or in part in the appeal
- identify the position of the agency that the applicant alleges was not substantially justified, and briefly state the basis for such allegation;
- state the number of employees of the applicant and describe the type and purpose of its organization or business, if the applicant is not an individual;
- contain a statement that the applicant's net worth does not exceed \$2 million (if an individual) or \$7 million (for all other applicants, including their affiliates). An applicant may omit this statement if it is a tax-exempt organization or cooperative association that meets the requirements in **7 CFR §1.190(b) (see Section 7 II.B.3)**;
- document the fees and expenses, including the cost of any study, analysis, engineering report, test, project, or similar matter, for which an award is sought;
- attach affidavits from any attorney, agent, or expert witness, stating the actual time expended and the rate at which fees and other expenses were computed and describing the specific services performed. The affidavit must state the hourly rate that was billed and paid by the majority of clients during the relevant time period. If no hourly rate is paid by the majority of clients because, for instance, the attorney or agent represents most clients on a contingency basis, the attorney or agent must provide information

- about two attorneys or agents with similar experience, who perform similar work, stating their hourly rate;
- include a description of any expenses for which reimbursement is sought and a statement of the amounts paid and payable. The adjudicative officer may require the applicant to provide vouchers, receipts, or other substantiation for any fees or expenses claimed; and
- include any other matters the applicant wishes the decisionmaker to consider.

**2. *Net Worth Exhibit.* (7 CFR §1.191)** An applicant, except a qualified tax-exempt organization or cooperative association, shall provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates, as specified in **7 CFR §1.184**, when the proceeding was filed.

**a. *Full disclosure.*** An applicant's net worth exhibit shall fully disclose the assets and liabilities of the applicant and any affiliates.

**b. *Sufficiency.*** The net worth exhibit shall be sufficient to determine whether the applicant qualifies under EAJA standards.

**c. *Release of Net Worth Exhibits.*** The net worth exhibit generally is included in the public record of the proceeding, but all or a part of the exhibit may be submitted to the NAD adjudication officer in a sealed envelope labeled "Confidential Financial Information" and accompanied by a motion to withhold the information from public disclosure describing the information sought to be withheld and explaining, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. §552(b)(1) through (9). The material must be served on agency counsel, but need not be served on any other party. If the adjudicative officer finds that the information should not be withheld from disclosure, it shall be placed in the public record of the proceeding. If the material is withheld from disclosure, any request to inspect or copy it will be referred to the NAD FOIA officer.

The adjudicative officer should consult with his/her supervisor for assistance in resolving issues related to disclosure.

**3. *Tax-Exempt organizations and cooperative associations.* (7 CFR §1.190(b))** A qualified tax-exempt organization or cooperative association must provide proof of its status. To demonstrate its status, an applicant may:

- attach a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. §501(c)(3)) or, in the case of a tax- exempt organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant's belief that it qualifies under such section; or
- state that it is a cooperative association as defined in section 15(a) of the Agriculture Marketing Act (**12 U.S.C. §114j(a)**).

**4. *Additional information.*** The adjudicative officer may require additional information to determine eligibility for an award.

**5. *Signature.* (7 CFR §1.190(e))** The application shall be signed by the applicant or an authorized officer or attorney of the applicant.

**6. *Oath.* (7 CFR §1.190(e))** The application shall include a written verification under oath or affirmation under penalty of perjury that the information in the application and accompanying material is true and complete to the best of the signer's information and belief.

**C. Time for filing applications. (7 CFR §§1.193 and 1.194)** An application must be filed no later than 30 days after a NAD determination is final (see **Section 6, Final Determination**). This deadline may not be extended.

**D. Location for filing applications and other submissions. (7 CFR §§1.147 and 1.194)** Applications for EAJA awards should be filed in quadruplicate at the appropriate NAD regional office. Where more than two parties are involved in the proceeding, an additional copy shall be filed for each additional party.

**E. Service of applications and other documents. (7 CFR §§1.147 and 1.194)**

**1. *Service by NAD.*** Applications for EAJA awards and pleadings or documents related to an application filed with a NAD office will be served on all other parties by NAD, except confidential financial information may be deleted prior to service (see **Release of Net Worth Exhibits, Section 7, II. B. 2.**).

**2. *Service by party by mail.*** Any document initially served on a person to make that person a party respondent, or other document specifically ordered by the adjudicative officer to be served by certified or registered mail, shall be deemed to be received by a party, other than the Secretary of Agriculture or agent thereof, on the date of delivery by certified or registered mail to the last known principal place of business of such party,

the last known principal place of business of the attorney or representative of record of such party, or last known residence of such party, if an individual. If such document is unclaimed or refused, it shall be deemed to be received by such party on the date of remailing by first-class mail to the same address.

**3. *Service by party by means other than mail.*** Any document served other than by mail, on any person to the NAD proceeding, other than the Secretary of Agriculture or agent thereof, shall be deemed to have been received by such party on the date of delivery to any responsible individual at, or leaving in a conspicuous place at, the last known principal place of business of such party, the last known principal place of business of the attorney or representative of record of such party, or last known residence of such party, if an individual, or delivery to such party if an individual, to an officer or director of such party if a corporation, or to a member of such party if a partnership, at any location.

**4. *Service to persons other than parties.*** Any subpoena or document service on any person other than a party to the proceeding, the Secretary of Agriculture, or an agent of a party or the Secretary, shall be deemed to be received by such person on the date of delivery by certified or registered mail to the last known principal place of business of such party, the last known principal place of business of the attorney or representative of record of such party, or last known residence of such party, if an individual, delivery other than by mail to any responsible individual at, or leaving in a conspicuous place at, any location, or delivery to such party if an individual, to an officer or director of such party if a corporation, or to a member of such party if a partnership, at any location.

**5. *Computation of time.*** Saturdays, Sundays, and Federal holidays shall be included in computing the time allowed for any filing. When such time expires on a Saturday, Sunday or holiday, the filing date is the next business day.

**F. Answer to application. (7 CFR §1.195)** Agency counsel may file an answer to an application for an EAJA award within 30 days after service of an application. The agency's answer must detail and justify any objections to the requested award. If the answer is based on any alleged facts not in the case record, the agency will include supporting affidavits or a request for further proceedings.

If the agency has not filed an answer to an application for EAJA fees within 30 days of service of an application, the adjudicative officer, upon a satisfactory showing of entitlement by the applicant, may make an award for the applicant's allowable fees and expenses. If agency counsel and the applicant have jointly filed a statement of intent to negotiate a settlement, the deadline for filing an

answer may be extended an additional 30 days. The adjudicative officer may grant additional extensions, as warranted, after consultation with the regional office.

**G. Reply. (7 CFR §1.196)** Within 15 days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant will include supporting affidavits or a request for further proceedings.

**H. Comments by Other parties. (7 CFR §1.197)** Any party other than the applicant and agency counsel may file comments on an application within 30 days after it is served, or on an answer within 15 days after it is served. A commenter may not participate further in the EAJA proceedings, unless the adjudicative officer determines that the public interest requires such participation in order to permit full exploration of matters raised in the comments.

**I. Amendment of filing. (7 CFR §1.37)** At any time before the filing of a motion for a hearing, a filing may be amended. Thereafter, such amendment may be made with the consent of the parties, or as authorized by the adjudicative officer for good cause shown.

### **III. BASIS FOR DETERMINATION (7 CFR §1.199)**

A determination of an award generally is made by the adjudicative officer based on the written record.



#### IV. FURTHER PROCEEDINGS (7 CFR §1.199)

**A. General.** Further proceedings are held only when necessary for full, fair resolution of the issues, and may be requested by the applicant or agency counsel or on the adjudicative officer's initiative. A request for further proceedings must identify the information sought or the disputed issues, and explain why additional proceedings are necessary to resolve the issues.

Further proceedings may include an informal conference, oral argument, additional written submissions or, as to the issues other than substantial justification (such as the applicant's eligibility or substantiation of fees and expenses), pertinent discovery or an evidentiary hearing. If an evidentiary hearing is justified, the adjudicative officer will notify the regional office.

**B. The hearing. (7 CFR §§1.30 et seq. and 1.199(c))** If an EAJA hearing is held, the adjudicative officer presides. EAJA hearings differ somewhat from appeal hearings. Timing elements, in particular, vary from the requirements of NAD hearings. **(Refer to Section 3. IV. for hearings in general, but note the following requirements specific to EAJA hearings.)**

**1. *Request for a hearing.* (7 CFR §1.141(a))** A hearing request can be included in an application, an answer, or a separate document filed within the time for an answer to be filed. If a hearing is not requested within the time allowed for filing an answer, a hearing is deemed to be waived.

**2. *Timing of hearing.*** The hearing will be scheduled as soon as possible after receipt of a request for a hearing. There are no regulatory requirements as to time and place of the hearing, but the convenience of the parties and the adjudicative officer will be considered.

**3. *Manner of the hearing.* (7 CFR §1.141(b) and (f))** The hearing may be in person or by telephone. The applicant proceeds first.

**4. *Failure to appear.* (7 CFR §1.151(e))** If the agency counsel fails to appear at a hearing without good cause, the agency will be deemed to have waived the right to a hearing and to have admitted any facts presented at the hearing and all material allegations of fact contained in the complaint. If the agency counsel fails to appear, the applicant may:

- present evidence to the adjudicative officer, or
- file a proposed decision and a motion for its adoption. If the agency counsel does not file objections, the adjudicative officer will issue a decision without further procedure.

**5. *Exchange of testimony.* (7 CFR §1.141(g))** At least 10 days prior to a telephone hearing, if the hearing is scheduled more than 20 days after the notice of hearing, the parties will exchange written statements of direct testimony that will be presented at the hearing, including the testimony of the party, any employee or agent of the party, and any expert witness. During the telephone hearing, direct testimony may be limited to the written statements previously exchanged, although supplemental testimony may be permitted by the adjudicative officer.

**6. *Posthearing procedure.***

**a. *Tape recording.* (7 CFR §1.141(i))** A copy of the tape recording of the hearing and of the transcript, if made, will be provided as soon as practicable following the hearing, but before the adjudicative officer issues a decision.

**b. *Objections.* (7 CFR §1.142(a))** A party may file objections to the tape recording or transcription of the hearing. The adjudicative officer may order corrections to the tape recording or transcript. Corrections to the transcript will be made without obscuring the original text.

**c. *Posthearing submissions.* (7 CFR §1.142(b))** Before the adjudicating officer issues a decision, the parties may submit proposed findings of fact, conclusions, and/or orders, together with briefs in support of such proposals. Such proposals shall be served on the other parties by the party presenting the proposal.

**7. *Written decision.*** Although regulations permit verbal decisions at the conclusion of a hearing (7 CFR §1.142(c)), a written decision will be issued after appropriate consideration of the filings, the testimony, and any posthearing submissions.

**C. Other proceedings.** If the adjudicative officer determines that other proceedings are needed to clarify the issues, support a claim, or other purpose, he/she may request additional written submissions, an informal conference, discovery, or any other activity that is reasonably anticipated to yield the desired information.

**V. DECISION**

**A. Content. (7 CFR §1.200)** The adjudicative officer will issue an initial written decision as soon as possible after completion of proceedings or receipt of posthearing submissions. The decision should include findings and conclusions as to:

- the applicant's eligibility and status as a prevailing party;

- an explanation for any difference between the amount requested and the amount awarded;
- if applicable, findings on whether the position of the agency was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust; and,
- if applicable, findings on whether special circumstances exist concerning the applicant's eligibility for an award.

If the applicant has sought an award against more than one agency, the decision will allocate responsibility for payment of any award among the agencies, and explain the reason for the allocation.

**B. Effective date. (7 CFR §1.142(c)(4))** The decision of the adjudicative officer becomes final 35 days after the date it is served on the respondent, unless it is appealed to the reviewing official.

## **VI. REVIEW**

**A. USDA review. (7 CFR §1.201)** The USDA Judicial Officer has final review authority. Either party may seek review. If neither party seeks review, the initial decision becomes a final decision of the Department 35 days after it is served upon the applicant.

**B. Judicial review. (7 CFR §1.202)** Judicial review of final agency decisions on awards may be sought as specified in **Title 5 U.S.C. §504 (c)(2)**.

## **VII. AWARDS**

**A. General. (7 CFR §1.185)** If it is determined that an applicant prevailed in an appeal, the applicant may receive an award for fees and expenses unless the agency's position was substantially justified. The agency's decision may be found to have been substantially justified, and thus no award warranted, even if the applicant prevailed in the appeal. An award may be reduced or denied if the NAD adjudicative officer concludes that the applicant unduly or unreasonably protracted the proceeding, or if special circumstances make the award unjust.

The adjudicative officer should contact the regional office for assistance in resolving issues related to awards.

**B. Allowable fees and expenses. (7 CFR §1.186)** Awards will be based on rates customarily charged in the community by persons engaged in the business of acting as attorneys, agents, and expert witnesses. Awards can be granted even if the appellant received the services free or at a reduced rate.

When calculating an award, consideration must be given to the time *actually* spent in the representation of the client in relation to the time *reasonably* spent in light of the difficulty or complexity of the proceeding. Other factors related to the value of the services may be considered. However, no award for attorney fees may exceed amounts set by laws and regulations. An award may include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent, or witness ordinarily charges clients separately for such expenses.

The adjudicative officer may award the reasonable cost of any study, analysis, engineering report, test, project, or similar matter that was necessary for the applicant's case, to the extent that the charge for the service does not exceed the prevailing rate for similar services.

**C. Awards against other agencies. (7 CFR §1.188)** If an applicant is entitled to an award because it prevails over an agency that participates in the appeal and takes a position that is not substantially justified, the award, or an appropriate portion of the award, will be paid by that agency.

**D. Payment of award. (7 CFR §1.203)** To obtain payment of an award, a successful applicant shall submit to the head of the appropriate agency a copy of the final EAJA decision granting the award and a statement that the applicant will not seek court review of the decision. The agency is to pay the award within 60 days, unless judicial review of the award or the underlying appeal has been sought by the applicant or any other party to the proceeding. NAD has no authority to enforce payment of an award.